APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-300

THOMAS L. ANDREWS,
Petitioner,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED
August 28, 1971

CERTIORARI GRANTED
November 16, 1971

CIVIL DOCKET
UNITED STATES DISTRICT COURT

C. Form No. 106A Rev.

CLOSED 2652

Jury demand date:
4-30-69 by defts

TITLE OF CASE	ATTORNEYS 3
THOMAS L. ANDREWS vs LOUISVILLE AND NASHVILLE RAILROAD COMPANY and SEABOARD COASTLINE RAILROAD COMPANY, as Lessees of the Properties known as THE GEORGIA RAILROAD	For plaintiff: Wall & Campbell [illegible] (Amy Estes) [illegible] Eighth Floor, Standard Bldg., 55 Marietta St., N. W. Atlanta, Ga. 30303 577-6100 For defendant: Heyman & Sizemore 310 Fulton Federal Bldg. Atlanta, Ga. 30303 Webb, Parker, Young & Ferguson Robert G. Young 927 Fulton Federal Bldg. Atlanta, Ga.

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed 4-28-69	Clerk	$15 00	APR 2 8 1969	Robert G. Young Atty	15 00	
			APR 3 0 1969	Treas.U.S.Dep.		15 00
J.S. 6 mailed 4-7-70	Marshal		MAY 4 1970	Alfred Young Atty	5 00	
Basis of Action:	Docket fee	5 00	MAY 7 1970	Treas.U.S.Dep.		5 00
Petition for Removal. (Action for reinstatement of job)			JUL 7 1970	Andrews Estes, atty	5 00	
	Witness fees		JUL 9 1970	Treas.U.S.Dep.		5 00
Action arose at:	Depositions					

ATTEST: A TRUE COPY.
CERTIFIED THIS AUG 4 1970
Claude L. Goza, Clerk
By: [signature] Deputy Clerk

JURY TRIAL DEMANDED

CLOSED 12652

DATE	PROCEEDINGS	Date Order or Judgment Noted
1969		
Apr. 28	3 Petition for removal from Superior Court of Fulton County, Ga., -with transcript of record including ANSWER, MOTION TO DISMISS, & BRIEF IN SUPPORT OF MOTION TO DISMISS; notice of removal, certificate of service, & $250 removal bond filed.	jar
30	4 Defts' DEMAND FOR JURY TRIAL, filed.	mjw
1970		
Feb. 5	SUBMITTED ON DEFTS. MOTION TO DISMISS.	rms
Apr. 7	29 Order filed granting defts.' motion to dismiss.	
	31 JUDGMENT filed & entered for defts, & against pltf. - defts. to recover costs of action from pltf.	
	Copy of order & judgment to counsel.	mjw
May 4	32 Pltf's. notice of appeal from the judgment on decision by the Court dated 4-7-70, filed. (cc to U.S.C.A. & counsel for deft.)	jms
	34 Pltf's. motion for reconsideration and brief in support thereof, filed.	"
6	$250.00 cost bond on appeal filed.	hds
18	SUBMITTED ON PLTF'S. MOTION FOR RECONSIDERATION.	pwm
June 11	37 Order filed denying pltf's. motion for reconsideration as to first and second grounds, but granting same as to third ground, subject to rt. of pltf. within 15 days hereof to amend pleadings, etc. (Copy to counsel)	rms
10	42 Pltf's notice of appeal to the U.S.C.A., filed. Copy defts & U.S.C.A. (Bond filed 5-6-70)	jar

I N D E X

SUPREME COURT OF THE UNITED STATES

TERM, 1970

No. 71-300

THOMAS L. ANDREWS,

Petitioner,

-v-

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 28, 1971
CERTIORARI GRANTED NOVEMBER 16, 1971

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

THOMAS L. ANDREWS,

Plaintiff

CIVIL ACTION
NO. 12652

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY and SEABOARD COASTLINE RAILROAD COMPANY, as Lessees of the Properties known as THE GEORGIA RAILROAD,

(Filed: August 28, 1969)

Defendants

PETITION FOR REMOVAL

To the Judges of the United States District Court for the Northern District of Georgia:

The petition of Louisville and Nashville Railroad Company and Seaboard Coast Line Railroad Company respectfully shows:

1.

On the 2nd day of April 1969, the plaintiff filed a complaint against the defendants in the Superior Court of the County of Fulton, State of Georgia which was served upon the defendants on April 8, 1969, said case being entitled "Thomas L. Andrews, Plaintiff, v. Louisville and Nashville Railroad Company and Seaboard Coastline Railroad Company, as Lessees of the Properties known as The Georgia

Railroad, Defendants," Docket No. B-44859. To said petition defendants filed their answer and motion to dismiss together with a brief in support of said motion and a copy of the plaintiff's petition and the said answer, motion and brief of the defendants are annexed hereto.

2.

The above described action is one of which this Court has original jurisdiction under the provisions of Title 28, United States Code, Section 1332, and is one which may be removed to this Court by the petitioners, defendants herein, pursuant to the provisions of Title 28, United States Code, Section 1441, in that it is a civil action wherein the matter in controversy exceeds the sum or value of Ten Thousand and No/100 Dollars ($10,000.00), exclusive of interest and costs, and is between citizens of different states.

3.

The plaintiff, Thomas L. Andrews, at the time this action is commenced was and still is a citizen of the State of Georgia and the defendant, Louisville and Nashville Railroad Company, at the time this action is commenced was and still is a corporation incorporated under the laws of the State of Kentucky with its principal place of business in the State of Kentucky and was not and is not a citizen of the State of Georgia wherein this action was brought. The defendant, Seaboard Coast Line Railroad Company, at the time this action is commenced was and still is a corporation incorporated under the laws of the State of Virginia with its principal place of business in the State of Virginia and was not and is

not a citizen of the State of Georgia wherein this action was brought.

4.

Petitioner files herewith a bond with good and sufficient surety under the provisions of Title 28 United States Code, Section 1446(d) conditioned that they will pay all costs and disbursements incurred by reason of the removal procedures hereby brought should it be determined that this action is not removable or is improperly removed.

WHEREFORE, petitioners pray that the above action now pending against them in the Superior Court of the County of Fulton, State of Georgia, be removed therefrom to this Court.

s/ Robert G. Young

s/ Heyman and Sizeman
ATTORNEYS FOR PETITIONERS

Robert G. Young
Heyman and Sizemore
310 Fulton Federal Building
Atlanta, Georgia 30303

- - - - -

STATE OF GEORGIA

COUNTY OF FULTON

Personally appeared before me, the undersigned officer duly authorized to administer oaths, ROBERT C. YOUNG, who, being duly sworn, says that he is Of Counsel for Louisville and Nashville Railroad Company and Seaboard Coast Line Railroad Company in the

above and foregoing proceeding, that he has read the Petition for Removal and that the allegations therein made are true to the best of his knowledge, information and belief.

s/Robert G. Young

Sworn to and subscribed before me, this 28 day of April, 1969.

s/ Jackie C. Summers
Notary Public

Notary Public, Georgia, State at Large
My Commission Expires Feb. 28, 1971.

...oOo...

NOTE: Portion of Record Omitted, Filed In Its Original Form

* * * * *

...oOo...

IN THE SUPERIOR COURT OF THE COUNTY OF FULTON
STATE OF GEORGIA

THOMAS L. ANDREWS,

BOOK 2397 PAGE 194

Plaintiff

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY and SEABOARD COASTLINE RAILROAD COMPANY, as Lessees of the Properties known as THE GEORGIA RAILROAD,

CASE NO. B-44859

Defendants

COMPLAINT

Comes now the Plaintiff before the Court to show that it has been damaged at the hands of the Defendants named herein all contrary to the law and in particulars according to the following facts:

1.

The Defendants named herein are corporations authorized to do business in this state under the laws of the State of Georgia, having their principal places of business in Fulton County and thereby are subject to the jurisdiction of this Court.

2.

The Defendants are in the business of operating railroads and railroad properties in the State of Georgia and elsewhere, and in carrying out this business they do hire and

retain the services of numerous employees who work a forty (40) hour regular week under specified conditions and with a stipulated schedule of benefits.

3.

That the Plaintiff in this action was an employee in good standing during the month of September 1967, and had been for many years prior thereto.

4.

That on or about the 30th of September, 1967, the Plaintiff was involved in an automobile wreck which necessitated that he be given medical care. That a great part of this medical care consisted of a neck operation involving several discs, two of which had to be fused together. That on or about the 18th March, 1968 he was pronounced cured and fit to return to work and dismissed from active medical care.

5.

That on or about the 3rd May, 1968, he was examined medically and pronounced fully recovered and capable of returning to the duties to which he had formally been assigned by his employer The Georgia Railroad Company.

6.

That the Plaintiff was then and is now fully recovered and capable of returning to work to continue his employment as formerly.

7.

That the Georgia Railroad Company has

consistently refused to allow the Plaintiff herein to return to work, giving as its sole reason that the Plaintiff is not now and never will be recovered sufficiently to perform his former duties with the Railroad Company.

8.

That the Railroad Company has stubbornly refused to heed the medical advice of expert medical doctors who state that the Plaintiff is fully recovered and capable of performing his duties as formerly. That the Railroad Company has consistently refused to permit the Plaintiff herein to return to work so that he may earn his living and support his family as formerly and as the other employees in good standing are permitted to do.

9.

That the Defendant Railroad has caused the Plaintiff to hire an attorney to enforce his rights to work for a living, merely because of the stubbornness of the Defendant Railroad in forcing this issue to litigation without cause. That Defendant Railroad has not even conducted a full medical examination of the Plaintiff's situation, but has arbitrarily and with a litigious attitude refused any consideration to the Plaintiff herein, thereby purposefully causing, without a shadow of right, the filing of this law suit.

10.

That the Defendant Railroad Company has wrongfully discharged your petitioner, That this wrongful discharge has cost the loss of earnings in the form of wages that would have been earned as of the 18th of March, 1968

up to and including the date of filing of this petition.

11.

That Plaintiff has been deprived of the expectancy of future earnings from the Railroad Company up until the date of his scheduled retirement, all according to contract, which amounts to a future expectancy of approximately ten (10) years.

WHEREFORE, Petitioner prays for judgment in this Court against the Defendant Railroad Company in the amount of Eight Thousand Ninety Six Dollars and Eighty Five Cents ($8,096.85) for loss of past earnings, being the current damages on the cause due to the wrongful discharge Plaintiff, and for One Hundred Thousand Dollars ($100,000.00) for loss of future earnings of which Plaintiff will be deprived in the same cause. Plaintiff also prays for attorneys fees for the bringing of this action in this Court, to be for the use of his attorney in the amount of Twenty Five Thousand Dollars ($25,000.00).

Respectfully submitted,

WALL & CAMPBELL

s/ John H. Howkins,
John H. Howkins,
Attorney

805 Standard Federal Building
Atlanta, Georgia 30303

523-8626

GEORGIA, Fulton County, Clerk's Office
Superior Court
Filed for Record 2 day of April 1969
Recorded APR 10 1968 19___

s/ (illegible) Clerk

...oOo...

ANSWER

(Number and title omitted) (Filed:

FIRST DEFENSE: Plaintiff's petition fails to set forth a claim against defendants upon which relief can be granted.

SECOND DEFENSE: Plaintiff is not entitled to recover in this action because he has not pursued the grievance procedures available to him under the contract between certain crafts and classes of employees and the Georgia Railroad which governs the rights of the plaintiff and has further failed to resort to or exhaust the administrative remedies available to him under the Railway Labor Act.

THIRD DEFENSE: Plaintiff is not entitled to recover in this action as the contract between certain crafts and classes of employees and the Georgia Railroad which governs the rights of the plaintiff does not provide any remedy or right for him to recover wages by reason of his being disqualified for employment because of a physical condition.

FOURTH DEFENSE: Defendants deny the allegations of paragraph 1, of the plaintiff's petition; defendants admit the allegations of paragraph 2. of the plaintiff's petition; defendants admit the allegations of paragraph 3. of the plaintiff's petition; answering

paragraph 4., defendants admit the allegations contained in the first two sentences and deny the allegations contained in the last sentence in said paragraph; defendants deny the allegations of paragraphs 5., 6., 7., 8., 9., and 10. of plaintiff's petition; answering paragraph 11., defendants deny the allegations of the same and state that plaintiff is still an employee of Georgia Railroad, temporarily disqualified because of his physical condition; that his seniority and all other rights are being preserved, and if and when his condition permits, based on medical examination by company doctors, he will be allowed to return to duty with all employment rights unimpaired; defendants state that they are not indebted to plaintiff in any sum whatsoever.

s/Robert G. Young

s/ Heyman and Sizemore
ATTORNEYS FOR DEFENDANTS

Robert G. Young
Heyman and Sizemore
310 Fulton Federal Building
Atlanta, Georgia 30303

521-2268

MOTION TO DISMISS

(Number and title omitted) (Filed:

The defendants move the court as follows:

1.

To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2.

That plaintiff is not entitled to recover in this action because he fails to show that he has pursued any grievance procedures available to him under the contract between certain crafts and classes of employees of which he is a part and the Georgia Railroad which, of necessity, must govern the rights of the plaintiff and has further failed to show that he has exhausted the administrative remedies avail to him under the Railway Labor Act.

s/ Robert G. Young

s/ Heyman and Sizemore

Robert G. Young
Heyman and Sizemore
310 Fulton Federal Building
Atlanta, Georgia 30303
521-2268

..oOo...

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

(Number and title omitted) (Filed: April 7, 1970)

O R D E R

In this suit for wrongful discharge from employment defendant railroad companies have moved to dismiss, alleging that plaintiff has failed to meet the federal jurisdictional requirement that he exhaust his administrative remedies before the National Railroad Adjustment Board, under 45 U.S.C. §153 First (i). Defendants are correct and, therefore, the petition must be dismissed.

Plaintiff filed a complaint in the Superior Court of Fulton County, Georgia, alleging that he was wrongfully discharged by the defendants, as lessees of the properties known as the Georgia Railroad. The case was removed to this court, and plaintiff has not objected to removal.

In the case of Walker v. Southern Ry. Co., 385 U.S. 196, 17 L.Ed. 2d 294 (1966), the United States Supreme Court stated, in pertinent part:

> "Provision for arbitration of a discharge grievance, a minor dispute, is not a matter of voluntary agreement under the Railway Labor Act; the Act compels the parties to arbitrate minor disputes before the National Railroad Adjustment Board established under the Act. Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co., 353 US 30, 1 L ed 2d 622, 17 S Ct 635.

385 U.S. at 198, 17 L.Ed.2d at 297. Plaintiff cannot maintain his action for damages, because his complaint does not allege that he has exhausted his remedy before the National Railroad Adjustment Board. O'Mara v. Erie Lackawanna Railroad Co., 407 F.2d 674 (2nd Cir. 1969).

Therefore, the complaint is hereby dismissed.

So ordered this the 3rd day of April, 1970.

s/ Albert J. Henderson, Jr.
Judge, United States District Court
for the Northern District of Georgia

...oOo...

JUDGMENT ON DECISION BY THE COURT

(Number and title omitted) (Filed: April 7, 1970)

This action came on for consideration before the Court, Honorable Albert J. Henderson, Jr., United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff take nothing, that the action be dismissed, and that the defendants LOUISVILLE AND NASHVILLE RAILROAD COMPANY and SEABOARD COASTLINE RAILROAD COMPANY, as Lessees of the Properties known as THE GEORGIA RAILROAD, recover of the plaintiff THOMAS L. ANDREWS, their costs of action.

Dated at Atlanta, Georgia, this 7th day of April, 1970.

CLAUDE L. GOZA
Clerk of Court

BY: s/ Mary J. Watson
Deputy Clerk

Filed & entered in Clerk's Office
this 7th day of April, 1970.
CLAUDE L. GOZA, CLERK DC

BY: s/ Mary J. Watson
Deputy Clerk

...oOo...

NOTICE OF APPEAL TO THE COURT OF APPEALS UNDER RULE 73(b)

(Number and title omitted) (Filed: May 4, 1970

Notice is hereby given that THOMAS L. ANDREWS, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Judgment on decision by the Court dated and entered April 7, 1970:

> "This action came on for consideration before the Court, Honorable Albert J. Henderson, Jr. United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,
>
> It is Ordered and Adjudged that the plaintiff take nothing, that the action be dismissed, and that the defendants LOUISVILLE AND NASHVILLE RAILROAD COMPANY and SEABOARD COAST-LINE RAILROAD COMPANY, as Lessees of the Properties known as the GEORGIA RAILROAD, recover of the plaintiff THOMAS L. ANDREWS, their costs of action."

Dated at Atlanta, Georgia, this 7th day of April, 1970"

WALL & CAMPBELL

s/ John H. Howkins
Attorneys for Appellant

Eighth Floor, Standard Bldg.
95 Fairlie Street, N.W.
Atlanta, Ga. 30303
577-6100

...oOo...

MOTION FOR RECONSIDERATION AND BRIEF IN SUPPORT THEREOF

(Number and title omitted) (Filed:May 4, 1970)

Comes now the plaintiff in the above styled matter and moves the Court to reconsider its Order and Judgment on decision by the Court dated and entered on April 7, 1970, on the following grounds:

1.

The Court has misconstrued the decision in the case of Walker v. Southern Railway Co., 385 U.S. 196, 17 L. Ed. 2d 294 (1966), in that while the Court in its Order refers to headnote 1, which states that parties are compelled to arbitrate before the National Railroad Adjustment Board, it nonetheless failed to consider headnote 2, which states in part as follows:

> "A discharged employee may bring an action for damages in a state court without first exhausting administrative remedies provided in the Railway Labor Act; . . ."

2.

Also, the Court in dismissing the instant case on the pleadings as it were is not properly construing the Federal Rules of Civil Procedure which first of all requires that pleadings only give "notice" and not spell out claims in the same detail that was required under the old common law pleadings.

Specifically, the Court's attention is called to Federal Rule 9(c) which relates to pleading the occurrence of conditions precedent. Interpretation of this section demands that the Court not dismiss an action for

failure to allege a condition precedent. The most that could be done would be to require, under a Motion for More Definite Statement or other appropriate motion, that the plaintiff allege what has occurred under the Railway Labor Act. In this connection see Sidebotham v. Robson, 216 F. 2d 816, and for cases so holding the Court's attention is called to Lada v. Wilkie, 250 F. 2d 211; U.S. v. Standard Oil Co. of California, 7 F.R.D. 338.

It has been held many times that a complaint cannot be dismissed for failure to state a claim unless it appears with certainty that no state of facts (emphasis supplied) could be proven upon which relief can be granted. Connelly v. Gibson, 355 U.S. 41, 2 L.Ed.2d 80.

3.

The case cited in the Court's Order, O'Mara v. Erie Lackawanna Railroad Co., at 407 F. 2d at page 674, has been appealed to the United States Supreme Court and there a Writ of Certiorari was granted and a decision entered February 24, 1970. It is cited at 25 L.Ed 2d 21, 397 U.S. 25. Of particular significance is headnote 2 of the decision, which again relates to the fact that a dismissed employee's petition should not be summarily dismissed:

> "Where the courts are called upon to fulfil their role as the primary guardians of a labor union's duty of fair representation to employees, complaints by employees should be construed to avoid dismissals, and employees at the very least should be given the opportunity to file supplemental pleadings unless it appears beyond doubt that the cannot state a good cause of

action."

WHEREFORE, the plaintiff prays that the Court reconsider its Judgment heretofore entered and reinstate the plaintiff's claim as prayed.

This 4th day of May, 1970.

Respectfully submitted,

WALL & CAMPBELL

s/ John H. Howkins
Attorneys for Plaintiff

Eighth Floor, Standard Building
95 Fairlie Street, N.W.
Atlanta, Georgia 30303
577-6100

...oOo...

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION AS TO FIRST AND SECOND GROUNDS, BUT GRANTING SAME AS TO THIRD GROUND

(Number and title omitted) (Filed: June 11, 1970)

This is a suit for wrongful discharge against the Georgia Railroad Company. It was filed on April 2, 1969. On April 28, 1969, defendants removed the case from the Superior Court of Fulton County, Georgia, to this court, alleging diversity jurisdiction. On the same day, defendants filed their answer and a motion to dismiss. Both as a defense and as basis for dismissal, defendants alleged that plaintiff had not exhausted his administrative remedies under the Railway

Labor Act. Plaintiff did not respond to defendants' motion in any way. On April 3, 1970, this court dismissed plaintiff's complaint, on the ground that he had not exhausted his remedy before the National Railroad Adjustment Board. Plaintiff filed a notice of appeal to the Fifth Circuit from the court's order dismissing his complaint. Simultaneously, he filed a motion for reconsideration in this court. It is this motion for reconsideration which the court presently considers.

In essence, the plaintiff asserts that the exhaustion of administrative remedies provided in the Railway Labor Act is not a jurisdictional prerequisite to a suit in the state court for damages for allegedly wrongful discharge. To support its contention, it quotes headnote 2 from the case of Walker v. Southern Ry. Co., 385 U.S. 196, 17 L.Ed. 2d 294 (1966), which states, in pertinent part:

> A discharged railroad employee may bring an action for damages in a state court without first exhausting administrative remedies provided in the Railway Labor Act.....

385 U.S. at 196, 17 L.Ed. 2d at 295. In the Walker case, the Supreme Court, in a per curiam decision, adverted to a line of cases, exemplified by Moore v. Illinois Central Railroad Co., 312 U.S. 630, 85 L.Ed. 1089 (1941), which had permitted the filing of a state suit for damages for wrongful discharge, without previously exhausting administrative remedies under the Railway Labor Act. The Court then raised the question whether it would overrule this line of cases, referring to its dictum in Republic Steel Corp. v. Maddox, 379 U.S. 650, 13 L.Ed. 2d 580 (1965), to the

effect that the Court expressly did not there overrule Moore, but awaited consideration of overruling it until a proper case was presented. The Court then made the following statement, which this court quoted in its former order dismissing plaintiff's complaint.

> Provision for arbitration of a discharge grievance, a minor dispute, is not a matter of voluntary agreement under the Railway Labor Act; the Act compels the parties to arbitrate minor disputes before the National Railroad Adjustment Board established under the Act.

385 U.S. at 198, 17 L.Ed.2d at 297. However, because of "considerable dissatisfaction" with the operations of the National Railroad Adjustment Board, as a result of which Congress had enacted Public Law 89-456, 80 Stat. 208, effective June 20, 1966, "drastically" revising the procedures of the National Railroad Adjustment Board, the court held that it would not overrule the Moore line of cases. For this reason, the headnote quoted by plaintiff is misleading, in the context of this case. The headnote states as a broad general proposition a holding which was limited to a factual situation involving procedural "defects" in the Railway Labor Act prior to the amendments of June 20, 1966. Thus, if plaintiff seeks to establish that the exhaustion of administrative remedies is not a prerequisite to his action before this court, he is incorrect. The dissent of Justice Harlan, joined by Justices Stewart and White, clearly establishes the rule that administrative remedies should be exhausted before resort to the courts, as do both the Maddox case and the case of Czosek v. O'Mara, ____U.S.____,25 L.Ed.2d 21, 24 (1970),

affirming O'Mara v. Erie Lackawanna Railroad Co., 407 F.2d 674 (2nd Cir. 1969). Therefore, plaintiff's motion for reconsideration is denied as to his first ground.

In his second ground, plaintiff points to Fed. R.Civ. P. 9(c), which states, with regard to the pleading of conditions precedent:

> In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

In this connection, plaintiff's complaint nowhere asserts that he has complied with all conditions precedent. Both defendants' answer and motion to dismiss set out the denial of performance of conditions precedent "specifically and with particularity" as required by Rule 9(c). Even in his motion for reconsideration, plaintiff has not alleged that he has exhausted his remedies before the National Railroad Adjustment Board, despite the fact that his motion is filed over 13 months after the filing of his complaint and the answer and motion to dismiss of the defendants. For these reasons, plaintiff's argument that this court should not dismiss an action for failure to allege a condition precedent is insubstantial. Not only has plaintiff failed to allege the condition precedent, he has not so much as suggested that he has satisfied such a condition. Therefore, the plaintiff's motion is denied as to his second ground.

In his third ground, plaintiff replows his second ground. He points to the case of

Czosek v. O'Mara, supra, which affirmed the case cited by this court in its earlier order, i.e., O'Mara v. Erie Lackawanna Railroad Co., supra, and quotes to the court from a headnote which preceeds that opinion in the reporter. The headnote is taken from the decision of the Supreme Court, 25 L.Ed.2d at 24, and is basically a quotation from the opinion of the Court of Appeals, 407 F.2d at 679, which was affirmed. In the Czosek case, the district court had dismissed the complaint against the railroad for failure to exhaust administrative remedies under the Railway Labor Act, analogous to the facts at bar. On appeal, the Court of Appeals for the Second Circuit reversed the decision of the district court, with respect to the union defendants, but affirmed the dismissal of the complaint against the railroad, with the condition that plaintiffs were to be allowed leave to amend their complaint to allege that the employer was somehow implicated in the union's alleged breach of duty of fair representation. This cause of action against the union does not require the exhaustion of administrative remedies before resort to the courts. Glover v. St. Louis-San Francisco Railroad Co., 393 U.S. 324 21 L.Ed.2d 519 (1969). The leave given to the plaintiffs in that case was given to establish involvement of the employer in the union's discrimination against the plaintiff, not to allow them to establish that they had exhausted their administrative remedies.

However, to avoid any possible suggestion of prejudice in this case, the court hereby grants plaintiff's motion to remand to the following extent. The granting of defendants' motion to dismiss hereby is made subject to the right of plaintiff, within fifteen (15) days from the date of entry of this order, to amend his pleadings to demonstrate

that he has exhausted his administrative remedies under the Railway Labor Act. It will not be adequate for him merely to assert that he has satisfied all conditions precedent to the filing of suit, because defendant already specifically has denied that this particular condition precedent has been satisfied. Therefore, his allegation must be specific and to the point, ie. that he has exhausted his remedies before the National Railroad Adjustment Board.

In summary, plaintiff's motion for reconsideration is granted to the extent indicated in this order.

So ordered this the 10 day of June, 1970.

s/ Albert J. Henderson, Jr.
Judge, United States District Court
for the Northern District of Georgia

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NOTICE OF APPEAL TO THE
COURT OF APPEALS UNDER RULE 73(b)

(Number and title omitted) (Filed June 30, 1970)

Notice is hereby given that THOMAS L. ANDREWS, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Judgement on decision by the Court dated and entered June 10, 1970.

ORDER

This is a suit for wrongful discharge against the Georgia Railroad

Company. It was filed on April 2, 1969. On April 28, 1969, defendants removed the case from the Superior Court of Fulton County, Georgia, to this court, alleging diversity jurisdiction. On the same day, defendants filed their answer and a motion to dismiss. Both as a defense and as basis for dismissal, defendants alleged that plaintiff had not exhausted his administrative remedies under the Railway Labor Act. Plaintiff did not respond to defendants' motion in any way. On April 3, 1970, this court dismissed plaintiff's complaint, on the ground that he had not exhausted his remedy before the National Railroad Adjustment Board. Plaintiff filed a notice of appeal to the Fifth Circuit from the court's order dismissing his complaint. Simultaneously, he filed a motion for reconsideration in this court. It is this motion for reconsideration which the court presently considers.

In essence, the plaintiff asserts that the exhaustion of administrative remedies provided in the Railway Labor Act is not a jurisdictional prerequisite to a suit in the state court for damages for allegedly wrongful discharge. To support its contention, it quotes headnote 2 from the case of Walker vs. Southern Ry. Co., 385 U.S. 196, 17 L.Ed. 2nd 294 (1966), which states, in pertinent part:

> A discharged railroad employee may bring an action for

> damages in a state court without first exhausting administrative remedies provided in the Railway Labor Act.....

385 U.S. at 196, 17 L.Ed.2d. at 295. In the Walker case, the Supreme Court, in a per curiam decision, adverted to a line of cases, exemplified by Moore vs. Illinois Central Railroad Co., 312 U.S. 630, 85 L.Ed. 1089 (1941), which had permitted the filing of a state suit for damages for wrongful discharge, without previously exhausting administrative remedies under the Railway Labor Act. The Court then raised the question whether it would overrule this line of cases, referring to its dictum in Republic Steel Corp. v. Maddox, 379 U.S. 650, 13 L.Ed.2d 580 (1965) to the effect that the Court expressly did not there overrule Moore, but awaited consideration of overruling it until a proper case was presented. The Court then made the following statement, which this court quoted in its former order dismissing plaintiff's complaint.

> Provision for arbitration of a discharge grievance, a minor dispute, is not a matter of voluntary agreement under the Railway Labor Act; the Act compels the parties to arbitrate minor disputes before the National Railroad Adjustment Board established under the Act.

385 at 198, 17 L.Ed. 2d at 297. However, because of "considerable dissatisfaction" with the operations of the National Railroad Adjustment Board, as a result of which Congress had enacted Public Law 89-456, 80 Stat. 208, effective June 20, 1966, "drastically" revising the procedures of the National Railroad Adjustment Board, the court held that it would not overrule the Moore line of cases. For this reason, the headnote quoted by plaintiff is misleading, in the context of this case. The headnote states as a broad general proposition a holding which was limited to a factual situation involving procedural "defects" in the Railway Labor Act prior to the amendments of June 20, 1966. Thus, if plaintiff seeks to establish that the exhaustion of administrative remedies is not a prerequisite to his action before this court, he is incorrect. The dissent of Justice Harlan, joined by Justices Stewart and White, clearly establishes the rule that administrative remedies should be exhausted before resort to the courts, as do both the Maddox case and the case of Czosek vs. O'Mara, ____ U.S. ____, 25 L.Ed.2d 21, 24 (1970), affirming O'Mara vs. Erie Lackawanna Railroad Co., 407 F.2d. 674 (2nd Cir. 1969). Therefore, plaintiff's motion for reconsideration is denied as to his first ground.

In his second ground, plaintiff points to Fed. R. Civ. P. 9(c), which states, with regard to the

pleadings of conditions precedent:

> In pleading the performance of occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

In this connection, plaintiff's complaint nowhere asserts that he has complied with all conditions precedent. Both defendants' answer and motion to dismiss set out the denial of performance of conditions precedent "specifically and with particularity" as required by Rule 9(c). Even in his motion for reconsideration, plaintiff has not alleged that he has exhausted his remedies before the National Railroad Adjustment Board, despite the fact that his motion is filed over 13 months after the filing of his complaint and the answer answer and motion to dismiss of the defendants. For these reasons, plaintiff's argument that this court should not dismiss an action for failure to allege a condition precedent is insubstantial. Not only has plaintiff failed to allege the condition precedent, he has not so much as suggested that he has satisfied such a condition. Therefore, the plaintiff's motion is denied as to his second ground.

In his third ground, plaintiff

replows his second ground. He points to the case of Czosek vs. O'Mara, supra, which affirmed the case cited by this court in its earlier order, i.e., O'Mara vs. Erie Lackawanna Railroad Co., supra, and quotes to the court from a headnote which preceeds that opinion in the reporter. The headnote is taken from the decision of the Supreme Court, 25 L.Ed.2d at 24, and is basically a quotation from the opinion of the Court of Appeals, 407 F.2d at 679, which was affirmed. In the Czosek case, the district court had dismissed the complaint against the railroad for failure to exhaust administrative remedies under the railroad Labor Act, analogous to the facts at bar. On appeal, the Court of Appeals for the Second Circuit reversed the decision of the district court, with respect to the union defendants, but affirmed the dismissal of the complaint against the railroad, with the condition that plaintiffs were to be allowed leave to amend their complaint to allege that the employer was somehow implicated in the union's alleged breach of duty of fair representation. This cause of action against the union does not require the exhaustion of administrative remedies before resort to the courts. Glover vs. St. Louis-San Francisco Railroad, Co., 393 U.S. 324 21 L.Ed.2d 519 (1969). The leave given to the plaintiffs in that case was given to establish involvement of the employer in the

union's discrimination against the plaintiff, not to allow them to establish that they had exhausted their administrative remedies.

However, to avoid any possible suggestion of prejudice in this case, the court hereby grants plaintiff's motion to remand to the following extent. The granting of defendants' motion to dismiss hereby is made subject to the right of plaintiff, within fifteen (15) days from the date of entry of this order, to amend his pleadings to demonstrate that he has exhausted his administrative remedies under the Railway Labor Act. It will not be adequate for him merely to assert that he has satisfied all conditions precedent to the filing of suit, because defendant already specifically has denied that this particular condition precedent has been satisfied. Therefore, his allegation must be specific and to the point, i.e., that he has exhausted his rememdies before the National Railroad Adjustment Board.

In summary, plaintiff's motion for reconsideration is granted to the extent indicated in this order.

So ordered this the 10 day of June, 1970.

s/ Albert J. Henerson, Jr.
Judge, United States District Court
for the Northern District of Georgia

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NOTE: Portion of Record Omitted, Filed In Its Original Form

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THOMAS L. ANDREWS,

Appellant

vs. CASE NO. _____

LOUISVILLE & NASHVILLE RAILROAD CO., and SEABOARD COAST LINE RAILROAD CO., as Lessees of the Properties known as THE GEORGIA RAILROAD,

Appellee

Appeal from a Judgement
Of the United States District Court
For the Northern District of Georgia,
Atlanta, Georgia

BRIEF FOR THOMAS L. ANDREWS

I.

STATEMENT OF THE CASE

This is an appeal by Thomas L. Andrews, Plaintiff, in the United States District Court, Northern District of Georgia, from a Judgement rendered June 10, 1970. The Plaintiff brought this action in the Superior Court of Fulton County, Georgia, seeking to recover damages from the Defendant for wrongful discharge.

The cause was removed to the United States District Court for the Northern District of Georgia, Atlanta Division, by the Defendant.

Defendant moved to dismiss the Complaint on the ground that Plaintiff had failed to exhaust his administrative remedies. The Honorable Albert J. Henderson, Jr., Judge, ordered the Complaint dismissed April 3, 1970, and Judgement was entered April 7, 1970; however Plaintiff's motion for Reconsideration was granted, and on June 10, 1970, the Judge passed an order permitting Plaintiff to amend his complaint to allege that he had exhausted his administrative remedies. The plaintiff cannot do so, and appeals from that Order. The Motion to Dismiss was based solely on a question of law.

II.

QUESTIONS PRESENTED

(1) Must a discharged (or status equivalent thereto) employee of a Railroad Company exhaust his administrative remedies as a prerequisite to maintaining an action for wrongful discharge under a common-law-theory seeking damages?

III.

STATEMENT OF FACTS

No evidence has been presented, and there has been no discovery in this case by either party. The issues are therefore limited to the scope of the pleadings in the complaint and answer. Plaintiff alleges that he was employed by defendant when injured by a third party, necessitating a medical furlough, that plaintiff was examined medically and pronounced fit to return to work, but that defendant failed and refused to take plaintiff off medical furlough status. In substance, defendant denies these allegations.

IV.

ARGUMENT

The question of whether a discharged employee of a railroad may accept a railroad's conduct as wrongful discharge and seek a common-law remedy through litigation without exhausting administrative remedies is a prerequisite to litigation has been litigated frequently with many apparently inconsistent decisions.[1]

The early cases on the issue show that a discharged employee pursuing common law remedies for wrongful discharge is an exception to the general rule that exhaustion of administrative remedies is a prerequisite to litigation as the Plaintiff is no longer a party

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1. Moore vs. Illinois Central Railway Company, 312 U.S. 630, 61 Sup.Ct. 754, 85 L.Ed. 1089, (1940), Slocum vs. Delaware, L. & W. Railroad Company, 339 U.S. 239, 70 Sup.Ct. 577, 94 L.Ed. 795 (1949), Lee vs. Virginia Railway Co., 89 Se 2nd 28 (1955), Walker vs. Southern Railway Company, 385, U.S. 196 17 L.ed. 2nd 294 87 S Ct 365, reh den 385 U.S. 1020, 17, L ed 2d 559, 87 S Ct 699 (1966), Republic Steel Corp. vs. Maddox 379 U.S. 650, 13 L ed 2nd 580 (1965), Cales vs. Chesapeake & Ohio Railway Co., 300 F. Supp 155 (1969), W. K. Ferguson vs. Seaboard Air Line Railroad Co., 400 F 2nd 473 (1968), Florida East Coast Railway vs. Hill, 233 So 2d 845, (D.C. Fla. 1970), O'Mara vs. Erie Lackawanna Railroad Co., at 407 F. 2d. at page 674.

to the Agreement may sue as any other injured Plaintiff might.[2]

In Moore vs. Illinois Central Railway Company, 312 U.S. 630, 61 Sup. Ct. 754, 85 L. Ed. 1089 (1940) the Court specifically found that nothing in the Act (48 Stat 1186, ch 691, §2, 45 USCA §151a, FCA title 45, §151a, USCA 94 L ed 799) took away from the Courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in Court. "But we find nothing in that Act to take away from the Courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in Court."[3] The 1966 amendments (Public Law 89-456, 80 Stat 208) to the Act have in no way changed the Act to deprive the Courts of jurisdiction. The case of Slocum vs. Delaware, L. & W. Railroad Company, 339 U.S. 239, 70 Sup. Ct. 577, 94 L. Ed. 795

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2. Moore vs. Illinois Central Railway Company, 312 U.S. 630 61 Sup. Ct. 754, 85 L. Ed. 1089 (1940), Slocum vs. Delaware, L. & W. Railroad Company, 339 U.S. 239, 70 Sup. Ct. 577, 94 L. Ed 795 (1949), Lee vs. Virginia Railway Co., 89 SE 2nd 28 (1955).

3. Moore vs. Illinois Central Railway Company, 312 U.S. 630 61 Sup. Ct. 754, 85 L.Ed. 1089, (1940), (at page 634 U.S. and page 1092 L.ed.)

(1949), also holds that the Railway Labor Act does not bar Courts from adjudicating such cases. "A common law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees."[4] Again, Appellant points out that the 1966 amendments (Public Law 89-456, 80 Stat 208), while streamlining administrative procedures neither deprives the Court of jurisdiction nor changes the Board's scope of authority.

Of course where a Plaintiff seeks by way of common law relief what the Board had jurisdiction of anyway, namely, severance pay of SIX HUNDRED NINETY-FOUR DOLLARS AND EIGHT CENTS ($694.08), the National Railroad Adjustment Board will take original jurisdiction.[5] Since the 1966 amendments (Public Law 89-456, 80 Stat 208) various Federal Courts have ruled on the issue, reflecting the failure of the 1966 amendments to change either the scope or jurisdiction of the Board and the failure of the 1966 amendments to deprive Federal Courts of jurisdiction of this matter.[6]

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4. Slocum vs. Delaware, L. & W. Railroad Company, 339 U.S. 239, 70 Sup. Ct. 577, 94 L.Ed. 795 (1949).

5. Republic Steel Corp. vs. Maddox, 379 U.S. 650 13 L. ed. 2nd 580, (1965).

6. Cales vs. Chesapeake & Ohio Railway Co., 300 F. Supp 155 (1969).

In Cales vs. Chesapeake & Ohio Railway Co., 300 F. Supp. 155 (1969), the 1969 decision held that a discharged railroad employee who alleged a common law wrongful discharge action was not required to exhaust his administrative remedies under the Act. W. K. Ferguson vs. Seaboard Air Line Railroad Co. 400 F. 2d 473 (1968) held that if and only if state law (not the Railroad Labor Act) required exhaustion of remedies, the wrongfully discharged employee would be required to exhaust administrative remedies as a prerequisite to civil litigation. A 1970 case, Florida East Coast Railway vs. Hill, 233 So. 2d 845 (D. C. Fla. 1970), most specifically holds that remedies available even under the 1966 amendments (Public Law 89-456, 80 Stat 208) to the Act are not the exclusive remedy whereby an allegedly wrongfully discharged employee may determine his rights. In this case, the Court specifically emphasized that while this alleged occurrence happened before the 1966 amendments (Public Law 89-456, 80 Stat 208) even if the amendments (Public Law 89-456, 80 Stat 208) were retroactive their decision would be the same; the 1966 amendments (Public Law 89-456, 80 Stat 208) to the National Railroad Labor Act did not deprive Courts of their jurisdiction and did not modify, alter, or extend the scope, authority or jurisdiction of the Board.

Roy Walker vs. Southern Railway Company, 385 U.S. 196 17 L. ed. 2nd 294 (1966), occasionally viewed as an exception to the rule that exhaustion of administrative remedies is a prerequisite to litigation is in fact one of the recent landmark decisions upholding the very rule that "a discharged employee may bring an action for damages in a State Court without first exhausting administrative

remedies provided in the Railway Labor Act ....."[7]. The rationale of the Walker decision was that the Railway Labor Act administrative remedies were unfair to employees and oppressively cumbersome. The Court even implied that because of the changes future cases might hold that the Railway Labor Act amendments of 1966 (Public Law 89-456, 80 Stat 208, 1966) had increased the scope authority or jurisdiction of the Board to hear common law claims for wrongfully discharged employees to the exclusion of the Federal Courts. However, not one single case so holds; and numerous cases as cited above continue consistently to hold that despite the 1966 amendments (Public Law 89-456, 80 Stat 208, 1966) courts have not been deprived jurisdiction of common law remedies for wrongfully discharged claimants. The case cited in the Lower Court's Order, O'Mara vs. Erie Lackawanna Railroad Co., at 407 F. 2d., page 674 (1969), affirmed the dismissal of Plaintiff's complaint for failure to allege exhaustion of administrative remedies, and the court went on to explain, however, that

> "Where the courts are called upon to fulfill their role as the primary guardians of a labor union's duty of fair representation to employees, complaints by employees

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7. Walker vs. Southern Railway Company, 385 U.S. 196, 17 L ed 2nd 294 87 S Ct. 365 reh den 385 U.S. 1020, 17 L ed 2d 559 87 S Ct 699 (1966).

> should be construed to avoid dismissals, and employees at the very least should be given the opportunity to file supplemental pleadings unless it appears beyond doubt that they cannot state a good cause of action."

It should be most especially noted that the O'Mara case meticulously avoids overruling any of the numerous cases positively holding that the discharged employee is not required to exhaust administrative remedies as a prerequisite to litigation.

The Cales, Ferguson, Walker, Lee, Moore, Slocum, and Florida East Coast Railway cases are to be seen as historically supporting and upholding the right of a wrongfully discharged employee to seek his remedy through the courts without first exhausting his administrative remedies. These cases developed that principle; and the Walker case initiated the much needed procedural reforms of the Act; but the numerous cases above cited as the historical development of the law throughout thirty years reflect not one case that overrules the established principles that in common law remedy for wrongful discharge is an exception to the exhaustion of remedies doctrine for a discharged employee not seeking reinstallment or a performance of a past obligation. The only expression of a rule to the opposite is found in the minority dissenting opinions quoted by the District Court below.

V.

CONCLUSION

WHEREFORE, the common law being firm and sound that it is, and the failure of the 1966

amendments (Public Law 89-456, 80 Stat 208) to the act to enlarge the Board's jurisdiction or diminish that of the courts and the cases following that procedural amendment conclusively show that the well-recognized and well-reasoned exception yet prevails; remedies available even under the 1966 amendments (Public Law 89-456, 80 Stat 208) to the Railway Labor Act are not the exclusive remedy whereby an allegedly wrongfully discharged person may determine his rights.

W. ALFORD WALL

ANDREW W. ESTES

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THOMAS L. ANDREWS,

Appellant,

V. CASE NO. 30307

LOUISVILLE & NASHVILLE RAILROAD CO., and SEABOARD COAST LINE RAILROAD CO., as Lessees of the Properties known as THE GEORGIA RAILROAD,

Appellee.

Appeal from a Judgment
Of the United States District Court
For the Northern District of Georgia,
Atlanta Division

BRIEF FOR APPELLEE

I.

STATEMENT OF ISSUE

The sole issue in this case is whether or not a discharged railroad employee aggrieved by the discharge may bring an action at law in an appropriate state court for money damages where such employee has failed to pursue his remedy under the administrative procedures established by his collective bargaining agreement subject to the Railway Labor Act and his right to review before the National Railroad Adjustment Board or a special board of adjustment under the 1966 Amendments to

the Railway Labor Act.

II.

STATEMENT OF FACTS

The Statement of Facts in the Brief of Appellant is accepted. Appellant states in Section I of his brief that he cannot amend to allege that he has exhausted his administrative remedies, although the court entered an order permitting him to do so.

III.

ARGUMENT

In the Brief of Appellant, reference is made to the right of the discharged employee to maintain an action under the common law. It should be pointed out that the common law rule is that in the absence of a contract or a controlling statute, the employer enjoys an absolute power of dismissing his employee without cause. 35 Am. Jur., Master and Servant, Sec. 26.

The employee in this case is subject to the Railway Labor Act. He, therefore, has a contract, negotiated by the representative of his craft or class of employment, which contract has grievance procedures available to him. This is required under the Act as set out in Title 45, Section 152, First, U.S.C.A.

Under the Railway Labor Act, Congress has provided an exclusive procedure for the settlement of so-called "minor disputes" -- those involving the interpretation or application of agreements concerning rates of pay, rules, or working conditions. Title 45, Section 153, First (i), U.S.C.A.

A discharge grievance such as the one the railroad employee has in the case at bar is clearly a dispute which comes within the above referred to section of the Act.

The Railway Labor Act further provides that such a dispute between an employee and a carrier shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such a dispute, but failing to reach an adjustment, the dispute may be referred by either party to the National Railway Adjustment Board. Title 45, Section 153, First (i), U.S.C.A. The award of such board is binding and may be enforced by the Federal District Court after appropriate action has been filed.

In 1966, Congress amended the Railway Labor Act, drastically revising procedures by which an employee could process his grievance. Special boards of adjustment are provided for and an agreement establishing such a board must be made within thirty (30) days from the date a request for one is made. Title 45, Section 153, Second, U.S.C.A. Under the new amendments, a provision is made for judicial review of a board decision if an employee loses. Title 45, Section 153, First (q), U.S.C.A.

In the report of the Senate Committee on Labor and Public Welfare, the purpose of the bill was stated as follows:

> "The principal purpose of the bill is to eliminate the large backlog of undecided claims of railroad employees pending before the National Railroad Adjustment Board, to expedite disposition

> of grievances and disputes over the interpretation and application of agreements, and to provide equal opportunity for limited judicial review of awards of the Board to employees and employers."

U.S. Code, Congressional and Administrative News, Vol. 2, p. 2285, 89th Congress, 2nd Session, 1966.

The Federal rule is clear that employees must exhaust their administrative remedies before resorting to court action.

In the case of Republic Steel Corporation vs. Charlie Maddox, 379 U. S. 650, 85 S.Ct. 614, 13 L.Ed.2nd, 580, the employee sued in a state court for severance pay allegedly owed him under the terms of a collective bargaining agreement. In the state court, judgment was awarded in favor of the employee on the theory that state law applies to suits for severance pay since the employment relationship was ended and, further, under Alabama law, the employee was not required to exhaust the contract grievance procedures.

The Supreme Court reversed, holding that federal law requires the employee to resort to grievance procedures under his employment contract.

The Court said:

> "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer

and union as the mode of redress."

> "A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation would 'inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.'"

In the Maddox case, supra, the contract was subject to the Labor Management Relations Act and not the Railway Labor Act.

Under the Railway Labor Act, and prior to the Maddox decision, the Supreme Court had held that a trainman was not required by the Railway Labor Act to exhaust the administrative remedies granted him by the Act before bringing suit for wrongful discharge, provided the state courts recognized such a claim. Moore vs. Illinois Central Railroad Co., 312 U. S. 630, 61 S.Ct. 754, 85 L.Ed. 1089 (1941), and Transcontinental & Western Air, Inc. vs. Koppal, 345 U. S. 653, 73 S. Ct. 906, 97 L.Ed. 1325 (1953).

But, in the Maddox case, the Supreme Court said:

"Federal jurisdiction in both Moore and Koppal was based on diversity; federal law was not thought to apply merely by reason of the fact that the collective bargaining agreements were subject to the Railway Labor Act. Since that time the Court has made it clear that substantive federal law applies to suits on collective bargaining agreements covered by Section 204 of the Railway Labor Act."

"Thus a major underpinning for the continued validity of the Moore case in the field of the Railway Labor Act, and more importantly in the present context, for the extension of its rationale to suits under Section 301(a) of the LMRA, has been removed."

The Fifth Circuit Court of Appeals has clearly stated the federal rule enunciated in the Maddox case. In the case of Boone vs. Armstrong Cork Company, 384 F. 2nd 285, the employee sued for alleged wrongful discharge in violation of a collective bargaining agreement. This Court held:

"If the collective bargaining agreement contemplates the use of a grievance procedure to protest a specific employer action, an employee may not sue for breach of contract on the basis of that action without first resorting to the procedure."

"Federal labor policy favors the use of grievance and arbitration

> procedures, and contractual provisions should be liberally interpreted so as to require resort to such procedures wherever a contrary result is not clearly indicated."

After the decision in the Maddox case, the question again came before the Supreme Court in the case of Roy Walker vs. Southern Railway Company, 385 U. S. 196, 87 S.Ct. 365, 17 L.Ed. 2nd, 294. The question raised in that case was whether or not the decisions in Moore vs. Illinois Central Railroad, supra, and Transcontinental & Western Air, Inc. vs. Koppal, supra, should be overruled in the light of the Maddox case.

The Court reiterated the rule in Maddox and stated that a discharge grievance was not a matter of voluntary agreement under the Railway Labor Act; that the parties were compelled to arbitrate their dispute before the National Railroad Adjustment Board established under the Act.

But the Court stated that at the time of the railroad employee's discharge in that case, there was considerable dissatisfaction with the operations of the National Railroad Adjustment Board and with some of the statutory features. The Court pointed out that railroad employees had had to wait as long as ten (10) years for a decision on their complaint.

The Court then said:

> "In consequence, Congress enacted. Public Law 89-456, 80 Stat. 208, effective June 20, 1966, which drastically revises

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CARD 2

> the procedures in order to remedy the defects. Of course the new procedures were not available to petitioner, and his case is governed by Moore, Slocum, and Koppal. The contrast between the administrative remedy before us in Maddox and that available to petitioner persuades us that we would not overrule those decisions in his case."

Thus, the Court laid the ground rules for the future by clear implication. The Maddox decision did, in effect, vitiate the Moore and Koppal cases, but the Court would not expressly overrule the latter decisions until a case was presented where the employee had the benefit of the administrative remedies provided by the 1966 amendment to the Railway Labor Act.

So far, no such case has reached the Court. In the case at bar, the railroad employee clearly had the benefits of the amended statute. A most persuasive case on this subject, which is directly in point with the instant case, is the case of Beebe vs. Union Railroad Company, 208 Atl.2nd 16, decided by the Superior Court of Pennsylvania.

Other courts have pointed the way on this question.

In the case of Dominguez vs. National Airlines, Inc., 279 F.S. 392, S. D. New York, the employee sued for wrongful discharge and reinstatement, after being dissatisfied with the Railroad Adjustment Board's decision. The Court said:

> "In so holding, we are mindful that in two separate decisions, the Supreme Court has held that the Railway Labor Act does not bar actions for wrongful discharge predicated on state law for breach of an employment contract. However, as explained in Union Pacific R.R. vs. Price, 360 U. S. 60k, 620, 79 S. Ct. 1351, 3 L.Ed.2d 1460 (1959), those decisions were predicated on the old Railway Labor Act which did not provide for judicial review of a board decision if the employee lost. Whatever judicial remedies were otherwise available were therefore preserved. Since federal law was then thought not to apply to suits for wrongful discharge, one of the remedies was a suit in the state courts for damages for wrongful discharge. Since the decision in those cases, however, the law has changed. It is now clear that collective bargaining agreements under the Railway Labor Act are subject to federal substantive law."

The Seventh Circuit Court of Appeals, in the case of Slagley vs. Illinois Central Railroad Company, 397 F.2d. 546, made the following statement in a footnote to the decision:

> "...the Supreme Court limited this exception to common-law wrongful discharge cases in which the relief sought is damages rather than reinstatement. Even this exception may be short-lived. The Court's most recent reaffirmation of it apparently rested on the

inadequacies of the Adjustment Board procedure, specifically the delay inherent in it and the unavailability to the employee of judicial review of Board decisions. Walker vs. Southern R. Co., supra. The Court's language implied that if the recent amendments to the Railway Labor Act (P.L. 89-456 Sec. 1, 2, 80 Stat. 208) make the Board's remedies more effective even this limited exception to the exclusiveness of Board jurisdiction over minor disputes may be abandoned."

In the case of W. K. Ferguson, et al vs. Seaboard Air Line Railroad Company, 400 F. 2nd, 473, cited in Appellant's brief, the Court specifically pointed out that the railroad employee in that case did not have the benefit of the amended statute and, therefore, the rule in the Walker case, supra, would apply as to his remedies.

IV.

CONCLUSION

We think it is basic law that Congress has preempted the right of a state court or a federal court under diversity jurisdiction to determine this labor contract matter on

the merits. The trial court was correct in dismissing this action.

Respectfully submitted,

s/Robert G. Young
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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30307

THOMAS L. ANDREWS,
Plaintiff-Appellant,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

(April 26, 1971)

Before THORNBERRY and GODBOLD, Circuit Judges, and BOOTLE, District Judge.

BOOTLE, District Judge: This case is before us on appellant's appeal from the district court's granting of appellees' motion to dismiss based on appellant's having failed to meet the federal jurisdictional requirement that he exhaust his administrative remedies before the National Railroad Adjustment Board, under 45 U.S.C. § 153, First (i). Simultaneously with filing

his appeal to this court, appellant filed a motion for reconsideration in the court below. This motion was granted to the extent that appellant have 15 days within which to amend his pleadings to demonstrate that he had exhausted his administrative remedies under the Railway Labor Act. Appellant, in his brief, admits that he cannot make such a showing. The sole question presented for decision is whether or not a discharged railroad employee aggrieved by his discharge may bring a common law action for damages where he has failed to pursue his administrative remedies under the Railway Labor Act.

The Supreme Court held in *Moore v. Illinois Central R. Co.*, 312 U.S. 630, decided in 1941, and in *Transcontinental & West. Air v. Koppal*, 345 U.S. 653, decided in 1953, that a discharged employee of a carrier subject to the Railway Labor Act may accept the discharge as final and "proceed either in accordance with the administrative procedures prescribed in his employment contract (including referral of the dispute to the appropriate division of the Adjustment Board) or he may resort to his action at law for alleged unlawful discharge if the state courts recognize such a claim. Where the applicable law permits his recovery of damages without showing his prior exhaustion of his administrative remedies, he may so recover, as he did in the Moore litigation, supra, under Mississippi law." *Transcontinental & West. Air. v. Koppal, supra* at 661. When *Moore* and *Koppal* were decided "federal law was not thought to apply merely by reason of the fact that the collective bargaining agreements were subject to the Railway Labor Act." *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 655 (1965). But "since that time the Court

has made it clear that substantive federal law applies to suits on collective bargaining agreements covered by § 204 of the Railway Labor Act, *International Assn. of Machinists v. Central Airlines, Inc.* 372 US 682 . . . and by § 301(a) of the LMRA, *Textile Workers v. Lincoln Mills*, 353 US 448." *Republic Steel Corp. v. Maddox, supra* at 655. And "thus a major underpinning for the continued validity of the Moore case in the field of the Railway Labor Act . . . has been removed." *Republic Steel Corp. v. Maddox, supra* at 655.

Following the *Maddox* decision of 1965, the Supreme Court, in 1966, in *Walker v. Southern R. Co.*, 385 U.S. 196, took a further look at *Moore* and *Koppal* and posed to itself the question "whether those decisions should be overruled in light of *Maddox*." The Court answered that question thusly:

> "Provision for arbitration of a discharge grievance, a minor dispute, is not a matter of voluntary agreement under the Railway Labor Act; the Act compels the parties to arbitrate minor disputes before the National Railroad Adjustment Board established under the Act. Brotherhood of Railroad Trainmen v Chicago River & Indiana R. Co. 353 US 30, 1 L ed 2d 622, 77 S Ct 635. Both at the time of petitioner's alleged discharge and at the time he brought his lawsuit, there was considerable dissatisfaction with the operations of the National Railroad Adjustment Board and with some of the statutory features. Congress initiated an inquiry and found that among other causes for dissatisfaction, 'railroad employees who have

grievances sometimes have to wait as long as 10 years or more before a decision is rendered [by the Board] on their claim'; for example, 'the First Division [which has jurisdiction over disputes involving yard service employees of petitioner's class] . . . has never been current in its work, [and has] a backlog of approximately 7 1/2 years . . . .' HR Rep No. 1114, 89th Cong. 1st Sess, at 3, 5; S Rep No. 1201, 89th Cong. 1st Sess, at 2. The Congress also found that 'if an employee receives an award in his favor from the Board, the railroad affected may obtain judicial review of that award by declining to comply with it. If, however, an employee fails to receive an award in his favor, there is no means by which judicial review may be obtained.' HR Rep, supra, at 15. S Rep, supra, at 3.

"In consequence, Congress enacted Public Law 89-456, 80 Stat 208, effective June 20, 1966, which drastically revises the procedures in order to remedy the defects. Of course the new procedures were not available to petitioner, and his case is governed by Moore, Slocum and Koppal. The contrast between the administrative remedy before us in Maddox and that available to petitioner persuades us that we should not overrule those decisions in *his* case." (Emphasis supplied). *Walker v. Southern R. Co., supra* at 198.

Reverting once more to *Maddox*, we find footnote 14 too significant not to be quoted.

> "Be refusing to extend Moore v. Illinois Central R. Co. to § 301 suits, we do not mean to overrule it within the field of the Railway Labor Act. Consideration of such action should properly await a case presented under the Railway Labor Act in which the various distinctive features of the administrative remedies provided by that Act can be appraised in context, e.g., the make-up of the Adjustment Board, the scope of review from monetary awards, and the ability of the Board to give the same remedies as could be obtained by court suit." *Republic Steel Corp. v. Maddox, supra* at 658.

We conclude that whereas *Walker* did not present the case for which the Supreme Court was waiting in which to overrule *Moore* and *Koppal* in that plaintiff in that case had been precluded from benefiting by the 1966 Amendments to the Act (which Amendments significantly accelerated the procedures for obtaining action by and relief from the National Railroad Adjustment Board and provided for the first time entree directly to the District Courts of the United States for employees not prevailing before the Board), the case at bar is precisely the case for which the Supreme Court has been waiting in that there is no contention that the plaintiff here could not enjoy all the benefits of the 1966 Amendments.

Appellees urge that we should follow *Moore* and *Koppal* until they are actually overruled by the Supreme Court. Normally such urging would be unnecessary, but here it must be unavailing. We agree with this comment by Mr. Justice Black in the sole dissent-

ing opinion in *Maddox:* "The Court recognizes the relevance of Moore and Koppal and, while declining expressly to overrule them in this case, has raised the overruling axe so high that its falling is just about as certain as the changing of the seasons." Accordingly, the judgment appealed from is AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

PETITION FOR A WRIT OF CERTIORARI

IN THE

Supreme Court of the United States

....., Term 1966 7/

No. 71-300

THOMAS L. ANDREWS,

Petitioner

v.

LOUISVILLE & NASHVILLE RAILROAD CO., and SEABOARD COASTLINE RAILROAD CO., as Lessees of the Properties known as THE GEORGIA RAILROAD

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES EDWARD SLATON
307 Southern Finance Building
Augusta, Georgia
Counsel for Petitioner

TABLE OF CONTENTS

Appendix

TABLE OF CITATIONS

Cases

Statutes

IN THE

Supreme Court of the United States

....., Term 19 71

No. .....

THOMAS L. ANDREWS,

Petitioner,

v.

LOUISVILLE & NASHVILLE RAILROAD CO., and SEABOARD COASTLINE RAILROAD CO., as Lessees of the Properties known as THE GEORGIA RAILROAD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Thomas L. Andrews, prays that the Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on April 26, 1971 and the judgment on re-hearing rendered in the proceedings on June 1, 1971, which was an order denying the Petition for Re-hearing. No opinion was rendered in connection therewith.

OPINIONS BELOW

The opinion and judgment of the United States District Court for the Northern District of Georgia, Atlanta Division, unreported appears at Appendix A, *Infra*, page 6. The opinion of the United States Court of Appeals, as yet unreported, appears at Appendix B, *Infra*, pages 7-12. The United States

Court of Appeals denied the Petition for Re-hearing and no opinion was rendered thereon. The order denying the Petition for Re-hearing appears at Appendix C, *Infra*, page 13.

JURISDICTION

The final order of the United States Court of Appeals for the Fifth Circuit was entered on June 1, 1971. See Appendix C, *Infra*, page 13. This Petition for Certiorari was filed within ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 USC, 1254 (1).

QUESTION PRESENTED

Must a discharged (or status equivalent thereto) union employee of a railroad company exhaust his administrative remedies under the Railway Labor Act as a prerequisite to maintaining an action for wrongful discharge under a common-law theory seeking damages.

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

28 USC, § 1254 (1)
48 Stat 1186, Ch 691, § 2, 45 USCA § 151a, FCA
§ Title 45, § 151a, USCA 94 L. Ed. 799
Public Law 89-456, 80 Stat 208

STATEMENT OF THE CASE

The Petitioner brought this action in the Superior Court of Fulton County, Georgia seeking to recover damages from Respondent. The Petitioner alleged that while he was employed by Respondent, he was injured by a third party, necessitating a medical furlough; that Petitioner was subsequently medically examined and pronounced fit to return to work, but that Respondent failed and refused to remove Petitioner from medical furlough status, which action on the part of Respondent, Petitioner alleges constituted a wrongful discharge actionable at common law. Respondent denies these allegations.

Petitioner did not exhaust his administrative remedies.

The cause of the action was then removed to the United States District Court, Northern District of Georgia, Atlanta Division, by the Respondent, who then moved to dismiss the Complaint, on the grounds that Petitioner had failed to exhaust his administrative remedies.

Respondent's Motion to Dismiss on that ground was granted and an Order was entered against Petitioner on April 7, 1970. After Petitioner's Motion for Re-hearing was granted on June 10, 1970, the District Judge entered an order permitting Petitioner to amend his Complaint to allege that he had exhausted his administrative remedies, but he could not, as he had not exhausted his administrative remedies.

The case was appealed to the United States Court of Appeals for the Fifth Circuit, and on April 26, 1971 an opinion and order affirmed the judgment below. On June 1, 1971, the Motion for Re-hearing was denied in the United States Court of Appeals.

There was no evidence adduced prior to dismissal of Petitioner's petition. Therefore, the issues are limited to the scope of the pleadings.

REASONS FOR GRANTING THE WRIT

1) The case at Bar is precisely the case for which the Supreme Court has been waiting since 1966. The 1966 case was *Roy Walker vs Southern Railway*, 385 US 196, 17 L Ed 2d 294, 87 S Ct 365 REH DEN 385 U.S. 1020, 17 L Ed 2d 559, 87 S Ct 699 (1966) where the Court specifically found that nothing in the Act (48 Stat 1186, Ch 691, § 2, 45 USCA § 151a, FCA Title 45, § 151a, USCA 94 L Ed 799) made exhaustion of administrative remedies a prerequisite to filing a suit in Court. While the United States Supreme Court in that case speculated as to future cases by virtue of the 1966 amendments to the Act (Public Law 89-456, 80 Stat 208) nothing in the 1966 amendment took the right away and such

case presented since that time has been distinguished for other reasons. In the *Arguelles* case, this Court recognized that nothing in the amendments clearly took the right away.

2) **Federal Courts hold divergent views as to the issue at Bar.**

3) **The decision appealed from does not reflect existing law.** "Appellee urges that we should follow *Moore* and *Koppal* until they are actually overruled by the Supreme Court. Normally, such urging would be unnecessary, but here it must be unavailing." (*Thomas L. Andrews vs L & N Railroad, et al*, Appendix B.)

4) **The United States Court of Appeals has misapprehended this Court's prior dictum and has failed to recognize the prevailing opinion of the majority of this Court.** (*U. S. Bulk Carriers, Inc. vs Dominic B. Arguelles*, ___US___, 27 L Ed 2d 456, 91 S Ct ___.) "In *Maddox*, there was no express exception governing individual claims of employees from § 301 Grievance Procedures and we decline to carve one out . . . the chronology of the two Statutes – § 596 and § 301 – makes clear that the judicial remedy was made explicit in § 596 and was not clearly taken away by § 301." p. 463. § 301 of the Act in question does not clearly take away the right to pursue the remedy of a worker through the common law, and the Supreme Court has refused to legislate that right away. Clearly, the Court of Appeals should not attempt to void that which the Supreme Court has been so very careful to preserve.

5) **Petitioner is entitled to the protection of existing law, notwithstanding the United States Court of Appeals premonitory ruling adopting Justice Black's former speculation.** "The Court recognizes the relevance of *Moore* and *Koppal*, and while declining expressly to overrule them in this case, has raised the overruling ax so high that its falling is just about as certain as the changing of the season". Rather, the Court of Appeals is bound by the right of Petitioner to pursue his common law remedy as by law is and has historically been provided.

CONCLUSION

For the reasons above outlined, A Writ of Certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JAMES EDWARD SLATON,
Attorney for Petitioner
307 Southern Finance Building
Augusta, Georgia 30902

ANDREW W. ESTES, Esq.
ALFORD WALL, Esq.
Co-Counsel

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

"This action came on for consideration before the Court, Honorable Albert J. Henderson, Jr. United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff take nothing, that the action be dismissed, and that the defendants LOUISVILLE AND NASHVILLE RAILROAD COMPANY and SEABOARD COASTLINE RAILROAD COMPANY, as Lessees of the Properties known as the GEORGIA RAILROAD, recover of the plaintiff THOMAS L. ANDREWS, their costs of action."

Dated at Atlanta, Georgia, this 7th day of April, 1970"

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30307

THOMAS L. ANDREWS,
Plaintiff-Appellant,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

---

(April 26, 1971)

Before THORNBERRY and GODBOLD, Circuit Judges, and BOOTLE, District Judge.

BOOTLE, District Judge: This case is before us on appellant's appeal from the district court's granting of appellees' motion to dismiss based on appellant's having failed to meet the federal jurisdictional requirement that he exhaust his administrative remedies before the National Railroad Adjustment Board, under 45 U.S.C. § 153, First (i). Simultaneously with filing

his appeal to this court, appellant filed a motion for reconsideration in the court below. This motion was granted to the extent that appellant have 15 days within which to amend his pleadings to demonstrate that he had exhausted his administrative remedies under the Railway Labor Act. Appellant, in his brief, admits that he cannot make such a showing. The sole question presented for decision is whether or not a discharged railroad employee aggrieved by his discharge may bring a common law action for damages where he has failed to pursue his administrative remedies under the Railway Labor Act.

The Supreme Court held in *Moore v. Illinois Central R. Co.*, 312 U.S. 630, decided in 1941, and in *Transcontinental & West. Air v. Koppal*, 345 U.S. 653, decided in 1953, that a discharged employee of a carrier subject to the Railway Labor Act may accept the discharge as final and "proceed either in accordance with the administrative procedures prescribed in his employment contract (including referral of the dispute to the appropriate division of the Adjustment Board) or he may resort to his action at law for alleged unlawful discharge if the state courts recognize such a claim. Where the applicable law permits his recovery of damages without showing his prior exhaustion of his administrative remedies, he may so recover, as he did in the Moore litigation, supra, under Mississippi law." *Transcontinental & West. Air, v. Koppal, supra* at 661. When *Moore* and *Koppal* were decided "federal law was not thought to apply merely by reason of the fact that the collective bargaining agreements were subject to the Railway Labor Act." *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 655 (1965). But "since that time the Court

has made it clear that substantive federal law applies to suits on collective bargaining agreements covered by § 204 of the Railway Labor Act, *International Assn. of Machinists v. Central Airlines, Inc.* 372 US 682 . . . and by § 301(a) of the LMRA, *Textile Workers v. Lincoln Mills*, 353 US 448." *Republic Steel Corp. v. Maddox, supra* at 655. And "thus a major underpinning for the continued validity of the Moore case in the field of the Railway Labor Act . . . has been removed." *Republic Steel Corp. v. Maddox, supra* at 655.

Following the *Maddox* decision of 1965, the Supreme Court, in 1966, in *Walker v. Southern R. Co.*, 385 U.S. 196, took a further look at *Moore* and *Koppal* and posed to itself the question "whether those decisions should be overruled in light of *Maddox*." The Court answered that question thusly:

> "Provision for arbitration of a discharge grievance, a minor dispute, is not a matter of voluntary agreement under the Railway Labor Act; the Act compels the parties to arbitrate minor disputes before the National Railroad Adjustment Board established under the Act. Brotherhood of Railroad Trainmen v Chicago River & Indiana R. Co. 353 US 30, 1 L ed 2d 622, 77 S Ct 635. Both at the time of petitioner's alleged discharge and at the time he brought his lawsuit, there was considerable dissatisfaction with the operations of the National Railroad Adjustment Board and with some of the statutory features. Congress initiated an inquiry and found that among other causes for dissatisfaction, 'railroad employees who have

grievances sometimes have to wait as long as 10 years or more before a decision is rendered [by the Board] on their claim'; for example, 'the First Division [which has jurisdiction over disputes involving yard service employees of petitioner's class] . . . has never been current in its work, [and has] a backlog of approximately 7 1/2 years . . . .' HR Rep No. 1114, 89th Cong. 1st Sess, at 3, 5; S Rep No. 1201, 89th Cong. 1st Sess, at 2. The Congress also found that 'if an employee receives an award in his favor from the Board, the railroad affected may obtain judicial review of that award by declining to comply with it. If, however, an employee fails to receive an award in his favor, there is no means by which judicial review may be obtained.' HR Rep, supra, at 15. S Rep, supra, at 3.

"In consequence, Congress enacted Public Law 89-456, 80 Stat 208, effective June 20, 1966, which drastically revises the procedures in order to remedy the defects. Of course the new procedures were not available to petitioner, and his case is governed by Moore, Slocum and Koppal. The contrast between the administrative remedy before us in Maddox and that available to petitioner persuades us that we should not overrule those decisions in *his* case." (Emphasis supplied). *Walker v. Southern R. Co., supra* at 198.

Reverting once more to *Maddox*, we find footnote 14 too significant not to be quoted.

"Be refusing to extend Moore v. Illinois Central R. Co. to § 301 suits, we do not mean to overrule it within the field of the Railway Labor Act. Consideration of such action should properly await a case presented under the Railway Labor Act in which the various distinctive features of the administrative remedies provided by that Act can be appraised in context, e.g., the make-up of the Adjustment Board, the scope of review from monetary awards, and the ability of the Board to give the same remedies as could be obtained by court suit." *Republic Steel Corp. v. Maddox, supra* at 658.

We conclude that whereas *Walker* did not present the case for which the Supreme Court was waiting in which to overrule *Moore* and *Koppal* in that plaintiff in that case had been precluded from benefiting by the 1966 Amendments to the Act (which Amendments significantly accelerated the procedures for obtaining action by and relief from the National Railroad Adjustment Board and provided for the first time entree directly to the District Courts of the United States for employees not prevailing before the Board), the case at bar is precisely the case for which the Supreme Court has been waiting in that there is no contention that the plaintiff here could not enjoy all the benefits of the 1966 Amendments.

Appellees urge that we should follow *Moore* and *Koppal* until they are actually overruled by the Supreme Court. Normally such urging would be unnecessary, but here it must be unavailing. We agree with this comment by Mr. Justice Black in the sole dissent-

ing opinion in *Maddox:* "The Court recognizes the relevance of Moore and Koppal and, while declining expressly to overrule them in this case, has raised the overruling axe so high that its falling is just about as certain as the changing of the seasons." Accordingly, the judgment appealed from is AFFIRMED.

APPENDIX C

Re: No. 30307 – Andrews vs. Louisville & Nashville Railroad Co., et al

Gentlemen:

You are hereby advised that the Court has today entered an order denying the Petition ( ) for rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of mandate.

Very truly yours,

EDWARD W. WADSWORTH
Clerk

By /s/ Frances Wolff
Deputy Clerk

CERTIFICATE OF SERVICE

This is to certify that I have on the day below written served counsel for Respondent with the within and foregoing Petition for Certiorari by placing in the United States mail three (3) copies of same in a properly addressed envelope with adequate postage thereon addressed to Robert G. Young, Fulton Federal Building, Atlanta, Georgia.

This 26 day of August, 1971.

James Edward Slaton

JAMES EDWARD SLATON

307 Southern Finance Building
Augusta, Georgia 30902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-300

THOMAS L. ANDREWS,

Petitioner,

V.

LOUISVILLE & NASHVILLE RAILROAD CO., and SEABOARD COASTLINE RAILROAD CO., as Lessees of the Properties known as THE GEORGIA RAILROAD,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT G. YOUNG
WEBB, PARKER, YOUNG & FERGUSON
927 Fulton Federal Building
Atlanta, Georgia 30303

Counsel for Respondents

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

JURISDICTION

The statement by Petitioner for Writ of Certiorari of the opinions below and ground upon which the jurisdiction of the Court is invoked is accepted by Respondents. The decision of the United States Court of Appeals for the Fifth Circuit has been reported and appears in 441 Fed.2d. 1222.

STATUTES INVOLVED

Title 45, Sec. 152, First U.S.C.A.
Title 45, Sec. 153, First (i) U.S.C.A.
Title 45, Sec. 153, First (q) U.S.C.A.*
Title 45, Sec. 153, Second U.S.C.A.*

*as amended June 20, 1966. Pub.L. 89-456, §§ 1, 2; 80 Stat. 208, 209.

QUESTION PRESENTED

STATEMENT OF THE CASE

The statement by Petitioner for Writ of Certiorari of the question presented for review and his statement of the case are accepted by Respondents.

ARGUMENT

The decision of the United States Court of Appeals for the Fifth Circuit which is complained of is based on principles established in prior decisions of this Court, and the exact question has been anticipated by this Court with the appropriate answer clearly implied.

In the case of *Republic Steel Corporation vs. Charlie Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d. 580, this Court held that federal labor policy requires that an employee must resort to grievance procedures under his employment contract before he could bring suit for severance pay.

The Court said:

> "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress."
>
> "A contrary rule which would permit an indi-

vidual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation would 'inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.' "

In the Maddox case, supra, the contract was subject to the Labor Management Relations Act and not the Railway Labor Act.

Under the Railway Labor Act, and prior to the Maddox decision, the Supreme Court had held that a trainman was not required by the Railway Labor Act to exhaust the administrative remedies granted him by the Act before bringing suit for wrongful discharge, provided the state courts recognized such a claim. *Moore vs. Illinois Central Railroad Co.*, 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089 (1941), and *Transcontinental & Western Air, Inc. vs. Koppal*, 345 U.S. 653, 73 S.Ct. 906, 97 L.Ed. 1325 (1953).

But, in the Maddox case, the Supreme Court said:

"Federal jurisdiction in both Moore and Koppal was based on diversity; federal law was not thought to apply merely by reason of the fact that the collective bargaining agreements were subject to the Railway Labor Act. Since that time the Court has made it clear that substantive federal law applies to suits on collective bargaining agreements covered by Section 204 of the Railway Labor Act."

"Thus a major underpinning for the continued

validity of the Moore case in the field of the Railway Labor Act, and more importantly in the present context, for the extension of its rationale to suits under Section 301(a) of the LMRA has been removed."

In his dissenting opinion, Justice Black said:

"The Court recognizes the relevance of Moore and Koppal and, while declining expressly to overrule them in this case, has raised the overruling axe so high that its falling is just about as certain as the changing of the seasons."

In the case of *Roy Walker vs. Southern Railway Co.*, 385 U.S. 196, 87 S.Ct. 365, 17 L.Ed.2d. 294, this Court took a further look at *Moore vs. Illinois Central Railroad Co.*, supra, and *Transcontinental & Western Air, Inc. vs. Koppal*, supra, and posed to itself, "whether those decisions should be overruled in light of Maddox."

The Court reiterated the rule in Maddox and stated that a discharge grievance was not a matter of voluntary agreement under the Railway Labor Act; that the parties were compelled to arbitrate their dispute before the National Railroad Adjustment Board established under the Act.

But the Court stated that at the time of the railroad employee's discharge in that case, there was considerable dissatisfaction with the operations of the National Railroad Adjustment Board and with some of the statutory features. The Court pointed out that railroad employees had had to wait as long as ten (10) years for a decision on their complaint.

The Court then said:

"In consequence, Congress enacted Public Law 89-456, 80 Stat. 208, effective June 20, 1966, which

> drastically revises the procedures in order to remedy the defects. Of course, the new procedures were not available to petitioner, and his case is governed by *Moore*, *Slocum*, and *Koppal*. The contrast between the administrative remedy before us in *Maddox* and that available to petitioner persuades us that we would not overrule those decisions in his case."

In the case at bar, there is no contention that the plaintiff here could not enjoy all the benefits of the 1966 amendments. Under such amendments, special boards of adjustment are provided for and an agreement establishing such a board must be made within thirty (30) days from the date a request for one is made. Title 45, Section 153, Second, U.S.C.A. Under the new amendments, a provision is made for judicial review of a board decision if an employee loses. Title 45, Section 153, First (q), U.S.C.A.

The Circuit Court rightly stated that such amendments "significantly accelerated the procedures for obtaining action by and relief from the National Railroad Adjustment Board and provided for the first time entree directly to the District Courts of the United States for employees not prevailing before the Board."

We submit that federal labor law on the precise question submitted to the Court of Appeals is well settled and no further decision is needed.

Petitioner cites the case of *U. S. Bulk Carriers vs. Arguelles*, 400 U.S. 351, 91 S.Ct. 409, 27 L.Ed.2d. 456, decided by this Court on January 13, 1971. This was a seaman's case in which he had a statutory right to bring a claim for wages in addition to the grievance procedures under his collective bargaining agreement.

The United States Court of Appeals for the Ninth

Circuit has considered the same question posed in this case in the light of Maddox, supra. In the case of *Richard E. Sullivan vs. Pacific and Arctic Railway and Navigation Company*, 430 Fed.2d. 267 (1971), the Court held that exhaustion of administrative remedies was necessary before an action could be brought for wrongful discharge. The Court did not decide the case on the question of whether or not the 1966 amendments to the Railway Labor Act corrected the deficiencies pointed out by this Court in the case of *Walker vs. Southern Railway*, supra. It held that the employee in question was precluded by the Railway Labor Act from bringing an action at law for wrongful discharge because he did not exhaust his remedies under the collective bargaining agreement. The Court did, nonetheless, examine the 1966 amendments and in a footnote to the decision concluded that Public Law 89-456 effectively corrected the defects.

CONCLUSION

For the reasons stated above, Respondents say that a petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT G. YOUNG
WEBB, PARKER, YOUNG & FERGUSON
Attorneys for Respondents

927 Fulton Federal Building
Atlanta, Georgia 30303
(404) 522-8841

CERTIFICATE OF SERVICE

This is to certify that I have on the day below written served counsel for Petitioner with the within and foregoing Brief for Respondents in Opposition to Petition for Writ of Certiorari by placing in the United States mail three (3) copies of same in a properly addressed envelope with adequate postage thereon addressed to James Edward Slaton, 307 Southern Finance Building, Augusta, Georgia 30902.

The day of , 1971.

ROBERT G. YOUNG
WEBB, PARKER, YOUNG & FERGUSON
927 Fulton Federal Building
Atlanta, Georgia 30303

NO. 71-300

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

THOMAS L. ANDREWS, *Petitioner*

V.

LOUISVILLE & NASHVILLE RAILROAD CO., ET AL,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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JAMES E. SLATON
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Augusta, Georgia

Counsel for Petitioner

INDEX

CITATIONS

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BRIEF FOR THE PETITIONER

SUMMARY STATEMENT OF THE CASE

The Petitioner brought this action in the Superior Court of Fulton County, Georgia, seeking to recover damages from Respondent. The Petitioner alleged that while he was employed by Respondent, he was injured by a third party, necessitating a medical furlough; that Petitioner was subsequently medically examined and pronounced fit to return to work, but that Respondent failed and refused to remove Petitioner from medical furlough status, which actions on the part of Respondent, Petitioner alleges constituted a wrongful discharge actionable at common law. Respondent denies these allegations. Petitioner did not exhaust his administrative remedies prior to filing suit.

The cause of action was then removed to the United States District Court, Northern District of Georgia, Atlanta Division, by the Respondent, who then moved to dismiss the Complaint on the grounds that Petitioner had failed to exhaust his administrative remedies.

Respondent's Motion to Dismiss on that ground was granted and an Order was entered against Petitioner on April 7, 1970. After Petitioner's Motion for Re-hearing was granted on June 10, 1970, the District Judge entered an Order permitting Petitioner to amend his Complaint to allege that he had exhausted his administrative remedies, but he could not so allege.

The case was appealed to the United States Court of Appeals for the Fifth Circuit, and on April 26, 1971, an Opinion and Order affirmed the Judgment below. On June 1, 1971, the Motion for Re-hearing was denied in the United States Court of Appeals, without an Opinion.

There was no evidence adduced prior to dismissal of Petitioner's Complaint. Therefore, the issues are limited to the scope of the pleadings.

OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, United States, rendered April 26, 1971 affirming the Judgment of the United States District Court.

The Order of the United States Court of Appeals for the Fifth Circuit, United States, without an Opinion rendered on June 1, 1971.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This appeal involves no constitutional provisions. This appeal involves the following statutes:

28 USC, § 1254 (1)

48 Stat 1186, Ch 691, §2, 45 USCA §151a,

FCA § Title 45, §151a, USCA 94 L. Ed. 799

Public Law 89-456, 80 Stat 208

QUESTION PRESENTED

Must a discharged (or status equivalent thereto) union employee of a railroad company exhaust his administrative remedies under the *Railway Labor Act* as a prerequisite to maintaining an action for wrongful discharge under a common-law theory seeking damages.

SUMMARY OF ARGUMENT

1) A common-law civil action seeking damages for wrongful discharge has been an historical exception to the exhaustion of remedies doctrine.

2) Nothing in the 1966 amendments (*Public Law 89-456, 80 Stat 208*) in any respect amended or modified the Act to deprive the Federal Courts jurisdiction in these cases. Nothing in those amendments diminished the power of the Federal Courts nor enlarged the scope of the jurisdiction of the Board. Those amendments were procedural only and were designed to decrease the average backlog of claims which was at that time approximately seven and one-half to ten years. The amendments have failed in their purpose as the average backlog is still approximately six years.

The existing law is that an employee may bring an action for wrongful discharge under a common-law theory without exhausting his administrative remedies. No decision has ever reversed this rule. In fact, this Court has steadfastly maintained that position. The Judgment and Opinion rendered by the United States Court of Appeals for the Fifth Circuit is clearly inconsistent with the existing law and policy as established by this Court. The Opinion upon review is premonitory, misapprehending this Court's prior dictum and fails to recognize the relevance of this Court's continuing position as expressed in *U.S. Bulk Carriers, Inc. v. Dominic B. Arguelles* (_____ U.S. _____, 27 L. Ed 2d 456, 91 S. Ct. _____, 1971).

ARGUMENT

1.

An action founded on a common-law theory of wrongful discharge seeking damages therefor is not subject to the general rule that a union railroad employee must exhaust his administrative remedies as a prerequisite to civil redress through the Court.

This exception is historic, and has been preserved since 1940. *(Moore v. Illinois Central Railway Co.*, 312 U.S. 630, 61 S. Ct. 754, 85 L. Ed. 1089, 1940). The reason for this doctrine is two-fold. It is probably best expressed in the case of *Lee v. Virginia Railway Co.*, 89 S.E. 2d 28 (1955). In that case, it was explained that where an employee accepts his discharge as final and seeks damages for breach of contract, then the Courts have jurisdiction. Where the employee later returns to employment with full senority rights, his sole remedy would be to pursue the administrative remedies provided under the Railway Labor Act. Of course, the distinguishing characteristic is whether the relationship of employer and employee exists. Where the past employee remains discharged, he remains in an exempt status.

Cases have permitted a discharged employee to maintain an action seeking damages, a remedy which the Board is without power to provide. Of course, where the employee is seeking reinstatement together with back wages, the Board would have the power, the authority to provide such remedy. But the distinguishing characteristic is not necessarily that the Board does not have power to provide such a remedy, but that the employee, having accepted his discharge as final, alleged to have been injured and damaged by the wrongful acts of the railroad company just as though the railroad company had run over his automobile at a grade crossing or set fire to his corn field.

2.

Nothing in the 1966 amendments (*Public Law 89-456, 80 Stat 208)* in any respect amended or modified the Act to deprive the Federal Courts jurisdiction in wrongful discharge cases. Nothing in those amendments diminished the power of the Federal Courts or enlarged the scope of the jurisdiction of the Board, nor invested the Board with powers to grant additional remedies (damages). Those amendments were procedural only and were designed to decrease the average backlog of claims which was at that time approximately seven and one-half to as much as ten years.

Of course, to completely understand the case, it should be pointed out that the controversy does not involve, effect or concern the rights or obligations of anyone other than Thomas L. Andrews and the railroad. The rights of other employees, present or past, were not involved. This controversy does not involve a "*labor dispute*" as that term is commonly understood; it does not involve the interpretation of a collective bargaining agreement or concern the wages or rates of pay or vacation or retirement or pension or senority rights or working conditions of any class or group of employees. No rights or liabilities of any union are involved, and, of course, this case does not involve the threat of a strike, work stoppage, picketing or any other burden on or interruption of interstate commerce.

The Railway Labor Act as amended in 1934 provides for the resolution of "disputes growing between an employee or a group of employees and a carrier or carriers growing out of a grievance or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions" by the National Railway Adjustment Board (45 U.S.C.A. §153(i)). Disputes of this character shall be handled in the usual manner up to and including the Chief Operating Officer of the carrier designed to handle disputes; but, failing to reach an adjustment in this manner, the dispute *may be* referred by petition of the parties or by either party to the . . . Adjustment Board (45 U.S.C.A. §153(i)); (emphasis supplied).

Prior to the 1934 amendment, phraseology was that such dispute "shall be referred" to the Board and by amendment this phrase was stricken and "may be referred" was inserted by that amendment.

The sole legal question involved in this field is whether *Moore v. Illinois Central Railroad Co.*, 312 U.S. 630, 61 S. Ct. 754, 85 L. Ed. 109 (1941), interpreting the new phraseology as permissive merely, shall be overruled. In *Moore v. Illinois Central Railroad Co.*, an employee was fired allegedly because he had sued the railroad. He exhausted part, but not all of the grievance procedures specified in a collective bargaining agreement between the Union and the Railroad. He then elected to consider his employment as terminated and sued for damages for wrongful discharge. It follows that under the authority of the *Moore v. Illinois Central Railroad Co.* case, the present action by the plaintiff against the Railroad for damages for wrongful discharge is proper in court. No question of the interpretation of the collective bargaining agreement is involved. By virtue of the agreement between the plaintiff's union and the railroad, the plaintiff may not be discharged except for legal cause.

It must be conceded that *Moore v. Illinois Central Railroad Co.* has never been overruled. However, the railroad has urged successfully in the Courts below that even though the *Moore v. Illinois Central Railroad Co.* case has not been overruled it has been *implicitly* modified by *Walker v. Southern Railway Co.*, 385 U.S. 196, 87 S. Ct. 365, 17 L. Ed. 2d 1084 (1966).

But it should be seen that the scope of the *Moore v. Illinois Central Railroad Co.* case was explained in *Slocum v. Delaware L & W R. Co.*; 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795 (1950), in which the railroad brought a declaratory judgment action against two Unions seeking an interpretation of the collective bargaining agreements in respect to a jurisdictional dispute between the Union. The U.S. Supreme Court held that disputes of this nature must be submitted to the National Railway Adjustment Board, pointing out that:

> "In this case the dispute concerned the interpretation of an existing bargaining agreement. It's settlement would have prospective as well as retrospective importance to both railroad and its employees, since the interpretation accepted would govern future relation of those parties. This type of grievance has long been considered a patent cause of friction leading to strikes. It was to prevent such friction that the 1926 Act provided for creation of the Adjustment Board . . . . This voluntary machinery proved unsatisfactory, and Congress . . . passed an amendment which directly created a National Adjustment Board . . . . The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements." 339 U.S. 242, 243, 70 S. Ct. 577, 94 L. Ed. 799, 800.

But in the *Slocum v. Delaware L & W R. Co.* case, the Supreme Court said:

> "Our holding here is not inconsistent with our holding in *Moore v. Illinois Central Railroad Co.*, 312 U.S. 630, 61 S. Ct. 754, 85 L. Ed. 1089. Moore was discharged by the railroad. He could have challeng-

ed the validity of his discharge before the Board, seeking reinstatement and back pay. Instead, he chose to accept the railroad's action discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar Courts from adjudicating such actions. *A common law or statutory action for wrongful discharge differs from any remedy the Board has power to provide, and does not involve questions of future relations between the railroad and other employees*". 339 U.S. 244, 70 S. Ct. 580, 94 L. Ed. 800 (emphasis supplied).

The distinction between the *Moore* case and the *Slocum* type of case has been maintained in all subsequent cases. A determination of *Slocum* disputes is one of the stated purposes of the Railway Labor Act . . . to avoid interruption to interstate commerce by requiring collective bargaining agreements and by requiring settling of disputes arising out of the interpretation of such agreements by conciliation, mediation, arbitration or adjustment. 45 U.S.C.A. §151(a). A *Moore* type dispute is strictly a private matter between a railroad and ex-employee in which the ex-employee seeks a remedy the National Railway Adjustment Board is not empowered to give. No questions of disruption of commerce or interpretation of a collective bargaining agreement are involved. In *Transcontinental & Western A. R. v. Koppal*, 345 U.S. 653, 73 S. Ct. 906, 97 L. Ed. 1325 (1953), the U. S. Supreme Court made a slight inroad into the *Moore* rule providing that if local applicable law required an employee to exhaust his administrative remedies in order to sustain his cause of action, he must show that he has done so. 345 U.S. 661, 662, 73 S. Ct. 910, 97 L. Ed. 1330, 1331.

The next two cases of significance were *Pennsylvania Railroad Co. v. Dade*, 360 U.S. 548, 79 S. Ct. 1322, 3 L. Ed. 2d 1422 (1959) and *Union Pacific Railroad Co. v. Price*, 360 U.S. 601, 79 S. Ct. 1351, 3 L. Ed. 2d 1460 (1959). *Dade* was a *Slocum* type of case, where the Supreme Court followed the *Slocum* rule.

Price involved an alleged wrongful discharge. However, in addition to exercising his contractual grievance procedures the discharged employee also sought reinstatement and back pay from the National Railway Adjustment Board. The Board found that he had been properly discharged. Thereafter, he sought common law damages for wrongful discharge in court. The Supreme Court held that the employee's election to submit his grievance to the Board as to the validity of his discharge, precluded him from seeking damages for wrongful discharge in a common law action. In arriving at this result, the Supreme Court referred to *Moore* in two helpful footnotes:

> "Since Respondent, instead of bringing his claim in court as was his right under *Moore* . . . , chose to pursue the claim before the Adjustment Board, he does not even argue that a holding that the Railway Labor Act precludes relitigation of the claims in the courts would deprive him of any constitutional right to a jury trial" 360 U.S. 609, 79 S. Ct. 1355, 3 L. Ed. 2d 1464; N. 6.

> " . . . the holding in *Moore* was simply that a common-law remedy for damages might be pursued by a discharged employee who did not resort to the statutory remedy before the Board to challenge the validity of a dismissal. A different question arises here where the employee obtained a determination from the Board, and, having lost, is seeking to relitigate in the courts the same issue as to the validity of his discharge." 360 U.S. 609, 79 S. Ct. 1355, 1356, 3 L. Ed. 2d, 1465 N. 8.

The dissenting opinion citing *Slocum* emphasized the fact that while the Board has the power to reinstate the employee with back pay, it cannot award him damages for wrongful discharge, which is certainly a different thing. 360 U.S. 620, 621, 79 S. Ct. 1362, 3 L. Ed. 2d 1472.

It is apparent now that a dichotomy appears to be developing within the railroad's strategic pincer movement of the case law. For, if the employee cannot obtain relief from the Board, and he is required to exhaust his administrative remedies, which will then preclude him from seeking his remedies in a court of law, how, then, can the employee ever obtain his civil redress from the wrongdoer railroad? He can not.

Next came, the *Republic Steel Corporation v. Maddox*, 379 U.S. 650, 85 S. Ct. 614, 15 L. Ed. 2d 580 (1965). It is strange that *Maddox* has created so much confusion with respect to the *Moore* case. *Maddox* neither involved a matter arising under the Railway Labor Act, nor claim for wrongful discharge. In *Maddox*, a plant was shut down and the issue was a matter of severance pay due to the employee pursuant to the terms of the outstanding collective bargaining agreement. Of course, the remedy sought in *Maddox* was one the Board was empowered to provide. Thus, *Maddox* is a *Slocum* type case potentially involving a number of employees depending upon the interpretation of the contract.

The main case upon which the Railroad relies is *Walker v. Southern Railway Co.*, 385 U.S. 196, 87 S. Ct. 365, 17 L. Ed. 2d 294, (1966). The *Walker* case is probably the most baffling case of this entire line of cases, and is probably the most misunderstood case in this entire line as well. Not only has the foundation of the case been misunderstood, and the law of the case has been misunderstood, but the implications of the case have been misapprehended by the Court of Appeals in the instant case, and applied in such a manner as to extend and distort the significance of the *Walker* case to the point where it has become a "Pandora's Box" opened to loose little demons of wild speculation, confusion and misapprehension. *Walker*, like *Maddox*, is not a wrongful discharge case.

The Union contract provided that an employee who was absent from work for thirty days without proper excuse lost his senority. The Railroad claimed that plaintiff had been absent for thirty days and deprived him of his senority. The plaintiff claimed that he had been absent for only twenty-nine days. The determination of the controversy thus involved the interpretation of the collective bargaining contract -- how is the thirty-day period computed? The employee snubbed the grievance procedure, treated his employment as terminated, and sued for the wages he would have earned if he had retained senority. See 354 Fed. 2d 950, 951. The Court of Appeals in that case, relying upon *Maddox* held that the plaintiff must first exhaust his contractual and statutory remedies before suing. The U.S.

Supreme Court reversed holding that *Maddox* was not controlling and that, pursuant to *Moore* the plaintiff was entitled to pursue his remedies in court without exhausting his administrative remedies. In so doing, the Supreme Court remarked that because the National Railway Adjustment Board was between seven and one-half and ten years behind in deciding individual employee grievance disputes, the Congress had amended the Railway Labor Act of 1966 in an attempt to remedy the situation. The Court also speculated in the *Walker* case that in the future, assuming the 1966 amendments were indeed the panacea they seemed to be that implicitedly the *Moore* and *Koppal* cases would be overruled.

In the instant case, the Court of Appeals attached so much significance to the implication in the *Walker* case, that their basis for ruling was not predicated upon existing law, but:

> "Appellees urge that we follow *Moore* and *Koppal* until they are actually overruled by the Supreme Court. Normally such urging would be unnecessary but here it must be unavailing. We agree with this comment by Justice Black in the sole dissenting opinion in *Maddox*: that 'Court recognizes the relevance of *Moore* and *Koppal* and, while declining expressly to overrule them in this case, has raised the overruling axe so high that its falling is just about as certain as the changing of the seasons.' Accordingly, the judgment appealed from is affirmed," 441 Fed. 2d 1222 (5th Cir 1971) Appendix page 54-55.

Of course, it is to be seen the significance the Court of Appeals attached to Justice Black's *sole dissenting opinion.* Justice Black was not expressing the Court's view that *Moore* and *Koppal* were not the existing law, or should not express the existing law, but was Justice Black's most concerned dissent even in a *Slocum* type case that access to the Courts should be deprived where it was not clearly taken away. To grasp Justice Black's most consistent and very forceful protection of the right of civil redress through the court systems we should observe and understand Justice Black's dissent in *Maddox* and concurring opinion

in *U. S. Bulk Carriers Inc. v. Arguelles*, _____ U. S. _____ 27 L Ed. 2d 456, 91 S. Ct. _____ (1971). While he concurred in the judgment and opinion of the court he adhered to in his dissent in *Maddox*, in which he expressed the view that the labor and management relations act should never be construed so as to require an individual employee after he is out of a job, to submit a claim involving wages to grievance and arbitration proceedings, or to surrender his right to sue his employer in court for the enforcement of his claim.

This Court, both in the *Arguelles* case and in *Textile Workers v. Lincoln Mills*, 353 U. S. at 451, 456, 1 L. Ed. 2nd 977, 980, redirected its attention to the Section 301 procedures noting that the enforcement by or against labor unions was the main burden of Section 301, though standing by individual employers to secure declarations of their legal rights under the collective agreements recognized. Since the emphasis was on suits by unions and against unions, little attention was given to the assertion of claims by individual employees and none whatsoever concerning the impact of Section 301 on the special protective procedures governing the collection of wages of maritime workers. Maritime unions, of course, like other unions, gain "prestige" by processing grievance claims. *Republic v. Maddox*, supra at 653, 13 L. Ed. 2d 583. An employer's interests are served by "limiting the choice of remedies available to agrieved employees". In *Maddox* there was no express exception governing individual claims of employees from Section 301 grievance procedures and this court declined to carve one out of the circumstances there present. The circumstances are quite different because of the express judicial remedy created by Section 596. The reluctance in *Maddox* to redesign the statutory regime of Section 596.

This Court, of course, in 1971 still expressly refused to redesign the statutory regime of Section 301, which would control this case.

The 1966 amendments have proved to be far less than the salve they were thought to be at the time of the *Walker* decision in 1966. It is now apparent that there is still a backlog, in some districts up to four (4) years, and it is also apparent that the backlogs vary drastically from district to district (36th Annual Report of the National Mediation Board Including the Report

of the National Railway Adjustment Board, Page 75, U. S. Government Printing Office (1970) NMB.1.1:970). Thus, this salve has become an obnoxious ointment further complicating this area of civil redress in several respects. Certainly, the law would not change depending on how well or poorly an administrative board might or might not resolve in a given period of time. While Petitioner insists that the *Walker* case is not applicable, being a *Slocum* type case rather than a *Moore* type case, even if it were, it would be an impossible result if the law were to fluctuate back and forth as the case load of administrative boards might fluctuate. Further, it would amount to unequal protection of the laws if the rule of law varied between districts from time to time depending on their respective case loads. It is well established that every citizen is entitled to the same protection of the law in Chicago, Detroit, Cleveland and Atlanta, Georgia. Any other ruling would be inconceivable, yet the railroad asserts, basically, that such a result must follow from the *Walker* case, if we are to understand that the law would vary depending upon case load.

It must further be noted that the 1966 amendments in no way modified the "may be referred" language of the 1934 amendment. Furthermore there is no indication that the 1966 amendment accomplished the hoped for speed-up in the procedures of the Board. It would be an unreasoned rule if the "may be referred" language of 45 U. S. C. A. §153(l) is to be construed as mandatory or permissive depending on how well some administrative board may from time to time do its job. Certainly, this Court may interstitially legislate, however, there is no suggestion from any record that the 1934 amendment should be or has been legislatively or judicially rewritten to "shall be referred" as in the original 1926 statute.

CONCLUSION

It has been demonstrated that the law as expressed in *Moore* has neither been changed legislatively nor judicially. The 1966 amendments effected only procedural remedies but neither diminished the power of the court nor enlarged the powers of the Board to provide for civil redress on a common-law theory of wrongful discharge seeking damages.

It is equally clear that the course of litigation has developed the railroad's pincer movement to exterminate the employee's constitutional right to jury trial by forcing the employee to go before the Board, which has no power to give damages which plaintiff seeks, yet at the same time to foreclose this employee's right to seek damages in a court of law. Every significant case since *Koppal* has considered this question on the basis of when may a wrongfully discharged employee go to court, i.e. what contractual or statutory remedies must he exhaust as a condition precedent to a common law suit? The elusive question before the Court today is *whether* a wrongfully discharged employee can ever get to court. Only the *Moore* case stands between the employee's access to the judicial system and the mandatory non-remedy administrative jungle. If the *Moore* case is overruled, the impact will not be procedural, but it will forever extinguish the railroad employee's action at common law for wrongful discharge. This Court has historically supported access to the Court for civil redress and it should not now abolish the common law wrongfully discharge cases to accommodate an administrative non-remedy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have on the day below written served counsel for Respondent with the within and foregoing Brief by placing in the United States mail three (3) copies of same in a properly addressed envelope with adequate postage thereon addressed to Robert G. Young, Fulton Federal Building, Atlanta, Georgia.

This _____ day of _____, 1972.

_____

ANDREW W. ESTES

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-300

THOMAS L. ANDREWS,
Petitioner,
v.
LOUISVILLE & NASHVILLE RAILROAD CO., and SEABOARD COASTLINE RAILROAD CO., as Lessees of the Properties known as GEORGIA RAILROAD,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENTS

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INDEX

TABLE OF CITATIONS

Cases

Statutes Cited

Miscellaneous Citations

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BRIEF FOR THE RESPONDENTS

I

OPINIONS OF THE COURTS BELOW

The Opinion of the United States District Court for the Northern District of Georgia, rendered on April 7, 1970, and an additional Order, after reconsideration on June 11, 1970, have not been reported. The Opinion of the United States Court of Appeals for the Fifth Circuit, rendered on April 26, 1971, rehearing denied, June 1, 1971, is reported at 441 F.2d 1222.

II

JURISDICTION

Jurisdiction of this Court has been invoked by the Appellant pursuant to 28 U.S.C., § 1254(1). A Petition for Certiorari was filed in this case on August 28, 1971, and Certiorari was granted on November 16, 1971. The Petition for Certiorari stated that the question presented was:

> "Must a discharged (or status equivalent thereto) union employee of a railroad company exhaust his administrative remedies under the Railway Labor Act as a prerequisite to maintaining an action for wrongful discharge under a common-law theory seeking damages." (Petition p. 2)

The Order granting Certiorari did not define the scope of the question.

III

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Appellant has stated that the appeal involves no Constitutional provisions. Appellee makes no contention as to any Constitutional questions. The statutes involved in this case are as follows:

> Railway Labor Act, § 1; § 1a; § 2, First, Second, Third, Sixth and Seventh; § 3, First and Second, 44 Stat. 577, as amended (45 U.S.C.A., § 151-53).

These Statutes are set forth in full in the Appendix to this Brief. Section 3 of the Railway Labor Act is set forth as it existed in 1965, and Public Law 89-456, §§ 1 and 2, 80 Stat. 208, amending that Section, is also set forth in full. The Railway Labor Act, § 3, was further amended in 1970, 84 Stat. 199; those amendments are not

material to the issues presented here but are set forth. See House Report No. 91-901; 91st Cong., 2d Session, 2 U.S.C.C.A.N. 2966 [1970]. Georgia Code Sections 20-1404, 1405, 1407, 1408, 1410 are illustrative of many state statutes and are set forth in full in the Appendix.

IV

QUESTION PRESENTED.

Is an action for breach of contract, based on the alleged wrongful discharge of a railroad employee, an action within the jurisdiction of any court, state or federal, when the employee concedes that he has not exhausted his administrative remedies under the Railway Labor Act?

V

STATEMENT OF THE CASE

The petitioner, Thomas L. Andrews, brought this action in the Superior Court of Fulton County, Georgia, a state court, alleging essentially that the Georgia Railroad had not allowed him to return to his normal job after an automobile injury, and, either additionally or alternatively, it is not clear which, alleged that the Railroad had wrongfully discharged the plaintiff. Andrews claimed lost wages, in the amount of $8,096.85 (representing wages due as of the date the Complaint was filed, April 2, 1969), and $100,000 for earnings which Andrews contended would be lost to him in the future. Andrews also asked for $25,000 in attorney's fees for his attorney. (App. 5)

The Railroad's Answer, in its critical part, stated that Andrews had not pursued the grievance procedures available to him under the collective bargaining contract applicable to him and further, had neither resorted to nor

exhausted the administrative remedies available to him under the Railway Labor Act. The Railroad further answered by denying that Andrews was medically fit to work, and denied that it had discharged him. The Railroad stated that Andrews was temporarily disqualified to work because of his physical condition, but that his seniority and all other rights were being preserved and if and when the company's doctor authorized his return to duty, he would be returned to duty with all of his employment rights unimpaired. (App. 9)

After removal to Federal Court on the grounds of diversity jurisdiction, the Railroad moved to dismiss the complaint on the ground that the employee had not shown that he had pursued any grievance procedures available to him under the collective bargaining contract, and further that he had not exhausted the Railway Labor Act's administrative remedies. (App. 10) The Court granted this motion as to the last ground, but on reconsideration, gave the employee leave to amend his complaint to specifically allege that he had exhausted his administrative remedies under the Railway Labor Act. (App. 17) No amendment was made, primarily because, as Andrews has indicated in his brief on the merits in this Court (p. 4), he could not allege that he had exhausted his administrative remedies.

No further Order was issued, and an appeal was taken to the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment below (App. 50), subsequently denying a Motion for Rehearing.

No evidence was ever submitted by either side in the trial court, and, thus, a stark legal question on the pleadings is presented.

VI

SUMMARY OF ARGUMENT

Under *Moore v. Illinois Central Railroad Co.*, 312 U.S. 630 (1941), a discharged railroad employee aggrieved by the discharge may either (1) pursue his remedy under the administrative procedures established by an applicable collective bargaining agreement subject to the Railway Labor Act, and his right of review before the National Railroad Adjustment Board, or (2) if he accepts his discharge as final, bring an action at law in an appropriate state court for money damages if the state courts recognize such a claim.

Six years ago, in 1966, in *Walker v. Southern Ry.*, 385 U.S. 196, this Court indicated that the legal underpinning for *Moore* had been substantially eroded by subsequent decisions. However, the Court declined to reverse or limit *Moore* out of existence at that time, primarily because the administrative remedy was not really a fair equivalent to the judicial remedy allowed in *Moore*.

In 1966, Congress passed several amendments to the Railway Labor Act, providing for:

(1) equal judicial review of awards in favor of and against employees, and

(2) an expedited procedure for unclogging the processes of the National Railroad Adjustment Board (NRAB) so that the administrative remedy would be comparable in procedural efficacy to the judicial remedy.

Experience since 1966 has shown that both of these reforms have accomplished the objectives sought and thus there is no longer any reason to delay in making the rights of workers in the railroad industry comparable to

those of workers who have collective bargaining agreements within the sphere of the Labor Management Relations Act.

The major problem in 1966 lay in the fact that grievances under railroad labor contracts either had to be processed to a special adjustment board, established by agreement of both management and unions (which frequently could not be obtained) or were assigned to the NRAB. The NRAB was then hopelessly overloaded, one of its major Divisions having a seven and one-half year backlog of undecided cases. Since that time, many cases have been withdrawn from the NRAB to one of the special "public law" adjustment boards which since 1966 may now be established on demand of *either* management or the labor representative. New docketings in the overburdened Divisions have dropped sharply, as the "public law" boards have become the court of first resort. Realistic projections of case loads indicate that by June 30, 1973, little more than one year's backlog of work will remain in the *most* congested Division of the NRAB.

The only other serious question raised in 1966 in *Walker* was the comparability of the damages obtainable in a legal action and those obtainable via arbitration. Once it is firmly grasped that a suit for "wrongful discharge" is nothing more than a suit for breach of an employment contract (for absent the contract there are no rights at law of course), it can be readily perceived that there is no distinction between the remedies. Under general contract law, an employee may recover his back wages, plus interest (occasionally) and his attorney's fee (more rarely). The NRAB can give him back wages, interest, attorney's fees (which he doesn't even need), and further compensation for lost benefits on a "make whole" basis. Further, the NRAB can order him put back to work, on a complete "make whole" basis. At law, such a return to

work would completely negate any additional damages beyond those which had accrued at the time of trial. Thus, there is not a shred of difference between the remedies.

If affirmed, *Moore* possesses the ability to seriously undermine the Railway Labor Act. "Wrongful discharge" is not a separate cause of action, but merely an allegation of facts underlying a claim for total breach of contract. A discharge can legally arise from any of numerous possible breaches of an employment contract. Whether a breach is total or partial depends on the materiality of the clause in question. Materiality of a particular provision requires analysis, interpretation, and weighing of the entire collective bargaining contract, which this Court has repeatedly said is not a function of federal courts when labor relations boards, specially equipped and experienced, are available for that purpose. To now clearly affirm *Moore* is therefore to give any disgruntled employee the *option* of declaring

(a) his contract has been breached;

(b) the breach is material, and thus total;

(c) he is thus "wrongfully discharged"; and

(d) the federal court has jurisdiction of his claim.

There is no sound legal basis for carving out suits for "wrongful discharge", and allowing *jurisdiction* to depend on the ultimate facts proven. Such a concept is unworkable in practice as this case demonstrates, and will ultimately erode the "minor" dispute provisions of the Railway Labor Act. Alternatively, "*jurisdiction*" includes the jurisdiction to determine jurisdiction. Thus, merely pleading a "wrongful discharge" creates court jurisdiction, under *Moore*, and will clutter the courts with numerous matters clearly within the province of the NRAB.

Such a choice is not necessary. *Moore* was decided under an apparently erroneous impression of the legislative his-

tory of the Railway Labor Act. The court, in 1941, relied upon a 1926 House Committee Report to find that a spirit of "voluntariness" underlay the grievance procedure. In doing so, it apparently somehow overlooked the spirit of the *1934* Amendments to the Railway Labor Act which had very little voluntariness about them so far as grievances were concerned.

Thus *Moore,* probably decided on erroneous authority to begin with, has been untenably distinguished and isolated to its facts, while never having been expressly reconsidered. The administrative remedy is now fully adequate, and in accord with well established principles, this Court should now unequivocally declare that the primary and exclusive remedy for all railway labor contract grievances, whether called "discharges" or anything else, is administrative.

VII

ARGUMENT AND CITATION OF AUTHORITIES

A. Introduction.

Under *Moore v. Illinois Central Railroad Co.*, 312 U.S. 630, 83 L. Ed. 1089, 61 S.Ct. 754, decided in 1941, a discharged railroad employee aggrieved by the discharge may either (1) pursue his remedy under the administrative procedures established by an applicable collective bargaining agreement subject to the Railway Labor Act, and his right of review before the National Railroad Adjustment Board, or (2) if he accepts his discharge as final, bring an action at law in an appropriate state court for money damages if the state courts recognize such a claim. See also *Slocum v. Delaware, L. & W.R. Co.*, 339 U.S. 239, 244, 94 L. Ed. 795, 800, 70 S.Ct. 577, *Transcontinental and Western Air Inc. v. Koppal*, 345 U.S. 653, 97 L. Ed. 1325, 73 S.Ct. 906. The question in this case is whether those decisions should be overruled in light of *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 13 L. Ed. 2d 580, 85 S.Ct. 614, decided in 1965.

The above was the opening paragraph in *Walker v. Southern Ry.*, 385 U.S. 196, 17 L. Ed. 2d 294, 87 S.Ct. 365, decided in 1966. This Court concluded at that time that the answer to the question in that case, whether those decisions should be overruled, was no, but clearly indicated that at the appropriate time and in the appropriate case, that answer might well change. The lower courts in this case, as well as other state and federal courts, have concluded that there is no longer any reason to fail to honor both the spirit and the letter of the Railway Labor Act by continuing to allow a dissatisfied railroad employee to pursue his grievance in court rather than require him to submit his grievance to the binding arbitration processes of the National Railroad Adjustment Board.

This case comes to this Court almost naked of any supporting evidence, other than what is contained within the pleadings. It fairly appears from them, however, that Andrews is a railroad employee, of a class which is covered by a collective bargaining contract. During his period of employment, he was injured in an auto accident, and was out of work for some months. A dispute then arose as to whether or not he was physically fit to return to work, the railroad contending that he was not, and Andrews claiming that he was. Andrews, either alternatively, or cumulatively, claims he was in effect discharged from employment; the Railroad contends in its answer that he is being retained on the rolls and will resume his full seniority at such time as he is fit to return to work. It should be noted that this case thus presents a question not discussed in the cases previously before this Court dealing with this general area, but one which we believe graphically illustrates the pitfalls which lie ahead unless the previous decisions of this Court are clarified and modified. There is not only a dispute in the present case as to whether Andrews' "discharge" was wrongful, which question has generally been present in all of these cases, but there is a preliminary question of fact as to whether he has been discharged at all, and if so, in what manner. Was there an actual discharge or firing, by the Railroad, or was the "discharge" a legal conclusion that the employment contract has been totally breached by the railroad's refusal to allow the worker to resume a particular job, while nevertheless retaining him in employee status. This question and its significance will be elaborated further on, but it should be borne in mind at all times while considering the statutes, precedents and policy questions discussed here.

For any argument to be coherent, we believe a brief summary of the statutory and judicial lines of development in the area of whether or not an established admin-

istrative agency has exclusive, primary jurisdiction in labor grievance matters should be attempted. These two lines are (1) a brief history of the Railway Labor Act, and (2) a line of cases interpreting the Railway Labor Act, and certain cases involving statutes such as the Labor Management Relations Act.

B. Brief History of the Railway Labor Act.

The Railway Labor Act was first passed in 1926. The 1926 Act, the foundation of our present structure, provided for creation of various adjustment boards by voluntary agreement between carriers and workers, for the purpose of settling grievances under existing agreements. But this voluntary machinery proved unsatisfactory (See House Report No. 1944, 73rd Cong., 2d Session), and in 1934, Congress, with the support of both the unions and railroads, passed an amendment which directly created the National Railroad Adjustment Board composed of representatives of railroads and unions. The Act thus represented a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its Congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railroad systems.[1]

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[1] The above is generally taken from Slocum v. Delaware, 339 U.S. 239, at 242-43. See also the extended discussion in Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 89 L.Ed. 1886, 65 S.Ct. 1282 (1945) and Brotherhood of R.R. Trainmen v. Chicago R. & I. R.R., 353 U.S. 30, 35, 1 L.Ed. 2d 857, 77 S.Ct. 823 (1957).

However, the Adjustment Board slowly developed a case of bureaucratic hardening of the arteries, and the backlog of cases (and of dissatisfied employees) gradually accumulated until it reached near-fatal proportions. The only alternative to the Adjustment Board as a device for resolving employee grievances was likewise unsatisfactory. Section 3, Second, of the Railway Labor Act (in its post-1934 form) authorized carriers and unions to mutually agree to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in that Section. But if a carrier was unwilling, and many of them were, to set up such local boards, or to take part in any such boards that may have been established by other carriers, the employees of that carrier had no other alternative but to process their grievances through the National Railway Adjustment Board.

Finally, in 1966, Congress was forced to re-examine the functioning of the Railway Labor Act, and in particular, of the National Railroad Adjustment Board. It found that the Second and Fourth Divisions of the Board, which handled primarily the shopcraft, and maritime and supervisory employee unions, were well abreast of their duties, and employee grievances were receiving prompt attention and expeditious disposition. However, the First and Third divisions, dealing primarily with train and yard service, and the remaining non-operating personnel respectively, were hopelessly backlogged. The First Division had, according to Senate Report No. 1201, 89th Cong., 2d Session (2 U.S.C.C.A.N. 2285 [1966]), a backlog of some seven and a half years work, while the Third Division had a backlog of about three and half years work. The Senate Report stated baldly "Regardless of the merits of the contentions by either side [unions and management], it is obvious that the National Railroad Adjustment Board in the operation of the First and Third Divisions has failed."

Pursuant to that conclusion, Congress passed Public Law 89-456 in 1966, authorizing a speedy process for disposing of grievances under existing contracts, both for grievances newly arising, and for those which had then been languishing (or would in the future) in the breast of the National Railroad Adjustment Board for more than twelve months. The remedy was to provide that either a carrier or an employee representative could request of the other the establishment of a special board of adjustment, to which each would appoint one number, (or the National Mediation Board could appoint a member for a recalcitrant party), and they would seek to dispose of the issue. If they could not, they would seek to jointly agree upon a third neutral member. If they could not agree on the appointment of a third neutral member, either member after ten days could request the National Mediation Board to appoint a neutral. Each party pays his own member, and the neutral member is paid by the National Mediation Board. An award made by any special adjustment board is as fully enforceable in the courts as that made by a Division of the National Railroad Adjustment Board itself.

How well that remedy has worked may be seen by reviewing the Thirty-fifth and Thirty-seventh Annual Reports of the National Mediation Board, a U.S. Government Printing Office publication, which show the cases on hand before the National Railroad Adjustment Board at the beginning and end of each fiscal year from 1965 through 1971, and the number of cases disposed of during that year, both for the Board as a whole, and by Division.[2] A cumulative summary of Table 9—Cases Docketed and Disposed of by the National Railroad Adjustment Board,

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[2] This Court has previously considered this a reliable source of information in this area. See Slocum v. Delaware, 339 U.S. 239, 247, note 5 to opinion by Justice Reed; Brotherhood of Locomotive Engineers v. Louisville & N. R.R., 373 U.S. 33, 47, 10 L. Ed. 2d 172, 83 S.Ct. 1059 (1963), note 5 to Opinion by Justice Goldberg.

Fiscal Years 1935-71 Inclusive, from the Thirty-fifth and Thirty-seventh Annual Reports is incorporated in the Appendix to this Brief for the convenience of the Court. A more extended analysis of the table is made, *infra*.

That the new Public Law boards are disposing of disputes in rapid order can be shown by reference again to the Thirty-fifth, Thirty-sixth, and Thirty-seventh Annual Reports of the National Mediation Board. For the fiscal year ending June 30, 1969, 192 Public Law boards were established, 222 convened, and together they disposed of 1652 cases on their merits. (P. 47 of the Thirty-Fifth Annual Report) In the year following; 168 Public Law boards were established, and 258 convened. The report does not note how many disputes were disposed of, but the procedure during fiscal year 1969 suggests that each one was disposing of a half dozen or more cases. (P. 43 of the Thirty-Sixth Annual Report) For the year ending June 30, 1971, 188 Public Law boards were established and 226 convened. Again there are no specific figures on the number of disputes of which they disposed. (P. 51 of the Thirty-Seventh Annual Report)

That the new procedure is working to the satisfaction of both management and employees is suggested by House Report No. 91-901, 91st Cong., 2d Session, accompanying Public Law 91-234, a 1970 amendment to Section 3, First, of the Railway Labor Act. (2 U.S.C.A.N. 2966 [1970]) The House Report noted that the changes, being revisions in the organizational structure of the First Division of the National Railroad Adjustment Board made necessary by the merger of some of the operating unions, had been "agreed to by the affected unions, and by all affected railroads." It is not unreasonable to suggest that if there was still dissatisfaction over the functioning of the First Division, the *bete noir* of 1966, Public Law 91-234 might well have been a vehicle to have made still further substantive changes. That none were apparently even considered

would strongly suggest that there is no major dissatisfaction with the functioning of the First Division so far as the parties affected by it are concerned.

C. This Court's Prior Interpretations of the Railway Labor and Related Acts on the Point in Question.

(i) The earliest decision in this area is not well founded as it was based upon an inappropriate authority.

Turning next to the further decisions of this Court interpreting Section 3 of the Railway Labor Act, we must start with *Moore v. Illinois Central Railroad Co.*, 312 U.S. 630. It is obvious from reviewing the cases which cite that part of the *Moore* opinion which concerns this present case that that opinion has troubled this Court ever since it was issued. *Moore* has been explained, harmonized, limited, and, in fact, has had virtually everything done to it which a court may do except to be unequivocally and without reservation affirmed or overruled. *Moore* arose almost entirely on some questions occasioned by the then novel case of *Erie R.R. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S.Ct. 817 (1938), having to do with whether the Mississippi Statute of Limitations on either oral or written contracts would apply to a railway labor contract, or was the Federal court free to fashion its own statute of limitations or, alternatively, to "reconsider" in its role as a state court, a prior decision of the Supreme Court of Mississippi. These were novel and interesting questions in the immediate post-Erie period, and occupied by far the greater part of the decision of this Court and that of the court below (reported at 112 F.2d 959). The question of whether or not an employee, claiming damages growing out of an alleged wrongful discharge had to pursue a remedy before the National Railroad Adjustment Board as a prerequisite or as an alternative to bringing suit in

a state court was treated as clearly a secondary issue by both this Court and the Fifth Circuit Court of Appeals. The Circuit Court cited no authority, and little more reasoning, in simply declaring that such an action was not necessary. This Court came to a similar conclusion based essentially on only two factors.

The first was that Section 3(i) of the Railway Labor Act, as amended in 1934, provided that:

> "... disputes ... shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes *may* be referred by petition of the parties or by either of the parties to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing on the disputes." (Emphasis added.)

The word "may" had been substituted in the 1934 amendment for "shall" and this Court purely surmised that the difference

> "was not, we think, an indication of a change of policy, but was instead a clarification of the law's original purpose. For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature."

The only source cited for this conclusion was House Report No. 328 of the 69th Congress, 1st Session, noted at 312 U.S. 636, n. 6.

Neither of these reasons bears close examination. The substitution of the word "may" for "shall" is susceptible

to at least *two* interpretations on its face. The first, the one chosen by this Court at that time, was that the employee was free to pick and choose between courts and Board as he saw fit. The second, which appears equally as likely, in the utter absence of any evidence, was merely a reflection of a desire on the part of Congress to make it absolutely clear that either the employee or the employer could abandon the dispute at any stage, and it need not automatically progress to the Adjustment Board upon the failure of the parties to adjust it among themselves. The earlier wording suggests that the parties could not let go of the dispute once they had begun it short of finding a solution to it. In other words, the substituted language, in effect, allowed one party to simply abandon the dispute without any implication, which would have been patently absurd, that the dispute had to be referred to the National Railroad Adjustment Board.[3]

Secondly, the conclusion that the Railway Labor Act was essentially a voluntary system was based upon the report which accompanied the *original 1926 Act*, not any report accompanying the 1934 amendments. The 1926 Act was, in fact, largely voluntary, but as this Court itself shortly after *Moore* noted, the voluntary nature of that Act in most of its significant features was its primary

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[3] As this Court shortly before had noted in an earlier Railway Labor Act case (Texas & N.O.R.R. v. Brotherhood of Ry. & Steamship Clerks, 281 U.S. 548, 568, 74 L.Ed. 1034, 50 S.Ct. 427 (1930), the meaning of a word in an Act of Congress may be gathered from the context. In this case, the context of the clause in question deals with disputes and their progression. Allowing a dispute to be peacefully abandoned or non-progressed certainly is an integral part of that context. It is a great deal closer in fact to the context of the clause than the idea that a party might choose to litigate in court, which was not even mentioned in Section 3 of the Act, as it then stood, until subsection (p) of Section 3, dealing with enforcement of final Board awards, was reached. On the basis of context, the suggestion offered here is a great deal more plausible than that reached by this Court in Moore. The change in emphasis from voluntary cooperation to compulsory settlement of "minor" dis-

weakness, and one of the purposes of the 1934 amendments was to make a great part of the Railway Labor Act mandatory and compulsory. See Section VI, B of this brief, *supra*.

The 1934 amendments need only to be read for the Court to perceive that whatever of a voluntary nature was left in the Act, was primarily in the major dispute field, while the minor dispute area was to be handled by compulsory processes. Thus, even if this Court had not already heavily circumscribed the original *Moore* decision, serious re-examination should certainly lead this Court to correct *Moore's* over-hasty ruling.

(ii) *SLOCUM V. DELAWARE*, the first in-depth analysis of the RLA and the NRAB, comes to an opposite conclusion than *MOORE*.

The next major case which considered the question raised in *Moore* was *Slocum v. Delaware, L.&W.R.R.*, 339 U.S. 239. This dispute arose because the Court of Appeals of New York, taking *Moore* at face value, concluded that *Moore* must mean that state courts had jurisdiction of actions arising out of a *breach* of a collective bargaining contract. This was inconsistent, however, with the spirit

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putes is more fully set out in Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 300-303, 88 L.Ed. 61, 64 S.Ct. 95 (1943), and General Committee of Adjustment v. Missouri-K-T R.R., 320 U.S. 323, 327-33, 88 L.Ed. 76, 64 S.Ct. 146 (1943). Of particular interest in the last opinion is the note that "But it is apparent on the face of the Act that while Congress dealt with this problem subject comprehensively, it left the solution of only some of those problems to the courts or to administrative agencies. It entrusted large segments of this field to the voluntary processes of conciliation, mediation, and arbitration." 320 U.S. at 332. It is significant that arbitration was included as one of the "voluntary processes" which were encouraged by the Act; the contrast with this opinion and that in Moore that compulsory arbitration was inconsistent with the voluntary concept of the Act is striking.

expressed in *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 90 L.Ed. 318, 66 S.Ct. 322 (1946), where this Court had held that Federal courts should not interpret such agreements prior to interpretation by the Adjustment Board. In *Slocum*, this Court held that since Federal courts should not interpret contracts, neither should State courts. In harmonizing that conclusion with *Moore*, the Court said in *Slocum*, as dicta, that an action for wrongful discharge, where the employee claimed damages for breach of contract, differed from any remedies which the Board had power to provide, and did not involve questions of future relations between the railroad and its other employees. Further the Court noted that any interpretation made by the Court in handling such a case, if it "must consider some provision of a collective bargaining agreement" would "of course have no binding effect on future interpretations by the Board." 399 U.S. at 244. Justice Reed, dissenting in *Slocum*, could not quite grasp how the distinction between "may" and "shall", found decisive in *Moore* in finding an indication of Congressional purpose sufficient to furnish a ground for holding that courts had concurrent primary jurisdiction, was no longer effective in *Slocum*. (Justice Reed did not dissent in *Pitney* for some reason, although his same reasoning would seem to have applied there as well.) Justice Reed might further have noted that there was nothing at all in the Act which distinguished discharge cases from any other grievance arising out of the contract, and yet the court had concluded in *Moore* that such disputes were litigable without requiring prior adjudication by the Adjustment Board.

(iii) A new rationale for *MOORE* is perceived in *KOPPAL*.

Obviously, this problem continued to trouble the Court for in *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653 (1953) *Moore* was explained on an entirely new

ground which had never even been so much as mentioned in either the original decision or in *Pitney, Slocum,* or any other Railway Labor case. Treating both *Moore* and *Koppal* as state court actions brought by an employee on the ground of diversity of citizenship to recover damages from his employer for "wrongful discharge", this Court held that the laws of the state in which the Federal court was sitting determined the requirements of the cause of action, including the necessity of exhausting administrative remedies under the employment contract, the interpretation of the contract, and the measure of damages to be applied. The Court held that the *Moore* case proceeded because the law of Mississippi did not require exhaustion of any alternative administrative remedy, while the law of Missouri, from whence the *Koppal* case arose, did require such exhaustion. Thus, the question whether an employee and employer would resolve their problems within the context of the Railway Labor Act, or could proceed to litigate in the nearest state court was to be determined by the vagaries of state procedural and substantive law governing exhaustion of remedies, statutes of limitations, residence, and other such niceties. State courts would also be interpreting contracts under their own laws, as modified by whatever their own conflict of law theories were. In other words, federal courts when acting as state courts by virtue of diversity jurisdiction, would eventually be handling substantive Railway Labor Act matters in direct competition with the National Railroad Adjustment Board, so long as the claim was couched in terms of "wrongful discharge" under *Moore.*

(iv) **The new rationale is destroyed in *CENTRAL AIRLINES.***

Having declared that such suits would be based upon state procedural and substantive law, this Court proceeded to largely cut the ground out from under that theory by

ruling in *International Association of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 10 L. Ed. 2d 67, 83 S.Ct. 956 (1963), that when Section 204 of the Railway Labor Act (45 U.S.C.A., § 184), made it the duty of every air carrier and of its employees to establish a board of adjustment, whether the contract doing so was adequate to accomplish that purpose would be determined by Federal law as to any question of validity, interpretation, and enforceability. The Court noted that it would be

> "fatal to the goals of the Act if a contractual provision contrary to the Federal command were nevertheless enforced under State law or if a contract were struck down even though in furtherance of the Federal scheme." 372 U.S. at 691.

Further, the Court noted that

> "a union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the Federal law upon it." 372 U.S. at 692.

Further the Court noted that in 1934, the National Railroad Adjustment Board awards were made enforceable in the Federal courts, and awards under voluntary arbitration agreements were likewise made expressly enforceable under the statute. The absurdity of having such contracts interpreted differently in each and every state was noted by an approving quotation by the Court from the dissenting judge in the court below, found at 372 U.S. 691, note 15.

To be sure, the question before this Court in *Central Airlines* was whether or not an express statutory command affecting the airline industry had been adequately complied with by the contract entered into between the union and the airline. The requirement was that the parties establish a system board of adjustment, which would perform functions comparable to those performed by

the National Railroad Adjustment Board. It was not a contract governing the employee-employer relations of the airline as such which was in question, but the reasoning of the *Central Airlines* case is such that there would seem to be no adequate reason why such reasoning would not apply to the substance of the collective bargaining agreement itself.

If that be the case, then of course *Moore* no longer has any foundation whatsoever, for as stated in *Koppal, Moore* was an action based on state law allowed to proceed because Mississippi did not require exhaustion of remedies. But if *Central Airlines* means what it seems to say, then there is no longer any basis in state law for suing on a railway labor collective bargaining agreement and, thus, whether or not state law allows or requires exhaustion of administrative remedies is no longer a factor.

(v) A case arising under the Labor-Management Relations Act for severance pay holds exhaustion of grievance procedures is required.

The matter there rested until a case comparable to the present one, but in the area governed by Section 301(a) of the Labor-Management Relations Act (29 U.S.C., § 185(a)) was reached in *Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965). Maddox had sued his employer in an Alabama state court for severance pay, allegedly due him because of a layoff. Maddox contended that the employer's breach was such as to amount to a breach of the employment contract giving rise to the severance pay claim, and the court accepted his theory that state law would govern such a suit since there was no relationship between the parties which was within the cognizance of Federal labor law. The state court relied upon *Moore* and *Koppal* and analogized them to the industrial labor acts. This Court noted that those analogies were not

valid because *Moore* and *Koppal* had been based upon state contract law and diversity jurisdiction, but in the meantime, it had become established that Federal law now applied to collective bargaining agreements under the Labor-Management Relations Act and, would impliedly be held to apply to the substance of collective bargaining agreements under the Railway Labor Act, by virtue of the logical extension of the *Central Airlines* case. As the Court noted:

> ". . . a major underpinning for the continued validity of the *Moore* case in the field of the Railway Labor Act, and more importantly in the present context, for the extension of its rationale to suits under § 301(a) of the LMRA has been removed." 379 U.S. at 655.

The Court then noted that of course it would not overrule *Moore* under the Railway Labor Act, at least not until a case was presented under the Railway Labor Act

> "in which the various distinctive features of the administrative remedies provided by that Act can be appraised in context, e.g., the make-up of the Adjustment Board, the scope of review from monetary rewards, and the ability of the Board to give the same remedies as could be obtained by court suit." 379 U.S. at 657, note 14.

Maddox of course was but a logical extension of the Court's previous precedent shattering opinion in *Textile Workers' Union v. Lincoln Mills,* 353 U.S. 448, 1 L. Ed. 2d 972, 77 S.Ct. 912 (1957), holding that Section 301 of the Labor-Management Relations Act of 1947 did not merely authorize Federal courts to take jurisdiction of suits upon collective bargaining contracts, but authorized them also to fashion a body of Federal law for the enforcement of those collective bargaining agreements and further to compel enforcement of collective bargaining

agreement arbitration clauses. Justice Black pointed out in *Maddox* that *Moore* and *Maddox* were irreconcilably opposed, and then noted that while the Court had declined expressly to overrule *Moore* and *Koppal* in the *Maddox* case, it had "raised the overruling axe so high that its falling is just about as certain as the changing of the seasons." 379 U.S. at 667.

(vi) The overruling axe is stayed, temporarily, due to the congestion of the NRAB, while Congress repairs the law.

Taking those analyses of *Moore* at face value, the Fourth Circuit Court of Appeals in *Walker v. Southern Railway,* 385 U.S. 196, 17 L.Ed. 2d 294, 87 S.Ct. 365 (1966) proceeded to rule that *Moore* was no longer valid and a suit based upon an alleged improper discharge in violation of a railroad collective bargaining agreement could not be maintained in Federal Court. (The action had been brought there by reason of diversity of citizenship.) The Court noted that

> "provision for arbitration of a discharge grievance, a minor dispute, is not a matter of voluntary agreement under the Railway Labor Act; the Act compels the parties to arbitrate minor disputes before the National Board established under the Act." 385 U.S. at 198.

However, the Court further noted that at the time of Walker's alleged discharge and at the time he brought his lawsuit (apparently sometime after he was discharged in 1957, according to the Fourth Circuit decision at. 354 F.2d 950), the National Railroad Adjustment Board was not, in fact, an adequate administrative remedy. Without using those words, it is the only conclusion which may reasonably be drawn from the Court's discussion of the *Walker* decision. The Court specifically noted unfavorably the backlog of some seven and a half years in the First

Division and the fact that "railroad employees who have grievances sometimes have to wait as long as ten years or more before a decision is rendered [by the Board] on their claim." 385 U.S. at 198. A second defect in the Board's procedure was found to be that if an employee received an award in his favor from the Board, the railroad might obtain judicial review of the award by declining to comply with it. But, if the employee failed to receive an award in his favor, there was no means by which judicial review could be obtained by him. The Court further noted that Public Law 89-456, effective June 20, 1966, would drastically revise those procedures and hopefully alleviate those specific problems. However, those procedures were not available to Walker. As a result, the Court held:

> "The contrast between the administrative remedy before us in *Maddox* and that available to petitioner persuades us that we should not overrule those decisions [*Moore, Slocum,* and *Koppal*], in *his* case." [Emphasis added.] 385 U.S. at 199.

Justices Harlan, Stewart and White dissented on the ground that it was unsound for the Court to make the question whether exhaustion of remedies applied depend upon its judgment as to how it thought the Board was functioning. Be that as it may, we are now confronted with a case in which the new remedies were clearly available to the employee and he refused to even attempt to use them.

D. The New Administrative Remedies Are Fully Adequate to Protect Employer-Employee Interests and at the Same Time Reduce Labor Disputes in This Vital Industry.

That such remedies exist, and are speedy and efficacious may readily be seen by the fact that two other employees of an affiliate of the Georgia Railroad, who were, in fact, discharged on September 30, 1971 (and not merely

claiming to be so, as this plaintiff is), had their cases heard by a special board of adjustment on February 15 and 16, 1972, and may well either be back at work or have been definitively discharged by the time this case is argued. Beyond this rather isolated and probably inconclusive indication (which is not in the record), we have undisputed evidence that the Board is clearing its docket and can probably even now provide a quicker remedy than litigation. The Table in the Appendix to this Brief may be fairly summarized as follows:

(a) The Board as a whole went from a backlog of 6,559 cases as of July 1, 1964 to a backlog of 3,015 cases on June 30, 1971. The number of cases disposed of was hovering during this period at an average of approximately 1,600 cases per year. Thus, there was less than a two year backlog pending for the Board as a whole at the end of the last reporting year.

(b) For the First Division, the major source of complaint in 1966, the figures for the comparable periods went from 4,062 down to 2,054. Although there has been a wider range in the number of cases disposed of each year, that figure fluctuating from 482 to 986, the 665 cases disposed of in the year ending June 30, 1971, would not be far from average. Thus, the figures might suggest an approximately three year backlog in the First Division as of July 1, 1971, a substantial improvement over the seven and a half year backlog in 1966. We will come back to this in a moment.

(c) For the Second Division, which would handle Andrews' complaint, and which was never considered a problem, the backlog went from 270 to 137, with the cases disposed of per year averaging in the neighborhood of 225, from which we might conclude that there remained less than a one year backlog.

(d) For the Third Division, the backlog went from 2,196 to 779, with that Division disposing of approximately 750 cases per year during this period. Thus, the Third Division has gone from three and a half years on the average to approximately one year.

(e) For the Fourth Division, which likewise was not considered a particularly pressing problem, the backlog, nevertheless, went from 31 cases to 45 cases with the Division disposing of an average of 92 cases a year, suggesting approximately a half year accumulation.

The gross statistical figures might superficially suggest that the First Division still represents a relatively serious problem since its approximately three year accumulation is not far from the backlog of about three and a half years work which Congress found objectionable in the Third Division in 1966. However, the figures require some further analysis. It should be carefully noted that in the Second, Third and Fourth Divisions, which are now fairly current with their work, by far the greater majority of the cases that have been actually disposed of have been cases which have been decided and concluded one way or the other. Thus, in the Second Division and in the Fourth Division, which have always been more or less current with their work, the number of cases withdrawn from the Board's consideration has remained relatively constant during the period 1965 to 1971. At the same time, the number of cases *withdrawn* from the First Division has risen relatively sharply, from an average of 305 for 1965-1966 to 482 for the fiscal years 1967-1971. In 1967 alone, the first year under the 1966 amendment, 478 cases were withdrawn from the Division, many of these presumably being the cases about which the grievance was relatively serious, and which had been languishing within the Division for more than one year. The figures do not tell us whether the withdrawals were to a

Public Law Board or were simply dismissals, but these figures also strongly suggest that what may be happening in the First Division is that many cases are being disposed of simply by being called for hearing at which time the representative for the party pressing the grievance is concluding that it would rather not pursue the matter any further. Such a process occurs in trial courts as well, as nuisance, frivolous and trivial cases are abandoned as promptly as called for trial. However, in any court, more such cases are filed when there is little likelihood of being brought to trial at any time in the near future. Of course, undoubtedly, many cases are being withdrawn to the special boards.

Thus, it is certainly erroneous to judge from the size of the backlog alone that there are a vast number of serious cases still pending before any Division of the Board, including the First Division.

It should further be noted that the number of cases being docketed by the First Division has declined during every year except one since the passage of the 1966 amendment, with only 69 cases being docketed in fiscal year 1971, the fewest of any of the four Divisions. The rate of decrease in the First Division's backlog (approximately 440 cases per year for the last two years), if continued, suggests that by June 30, 1973, little more than one year from now, there will be not much more than one year's backlog remaining. Whether this rate of decrease will continue, of course, is uncertain, but it does not seem an unreasonable assumption.[4]

Indeed, whether the backlog now be one, two or even three years, it would not seem to be of such proportions that the statutory scheme should be utterly disregarded. Such delays are not uncommon in court cases. From filing

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[4] For a similar analysis of rate of decline in NRAB case load, see BLE v. Louisville & N. R.R., 373 U.S. 33, 10 L. Ed. 2d 172, 83 S. Ct. 1059 (1963).

the complaint to the order of dismissal in this case, it was more than 13 months, even though the motion to dismiss was promptly filed; had the case gone to trial, that time would be close to two years in the District Court alone at this time. Reports of the Director of the Administrative Office of the United States Courts show a one year backlog of criminal cases, and one to two year backlogs of civil cases almost uniformly in the various federal District Courts.

Recent additions to the ranks of District Judges have begun to ease that load, but in not even the most well-appointed district can a case for "wrongful discharge" be filed, answered, and brought to trial and disposed of within the three to four months that a similar case could be handled under the Public Law boards. This of course is not to say that all board cases are handled within that period of time. On a small railroad with a minimum number of disputes, particularly if the union involved does not have many members on that road, a special board might not (by the consent of both parties, however) be called until it had enough grievances to handle for the parties to wish to expend their own funds in compensation of the board members. However, the 1966 amendment specifically requires the carrier or the employee representative upon whom a request is made for a special board to join in an agreement establishing such a board within thirty days from the date such a request is made. Of course, there is no basis to believe that the present procedure encourages any extended stalling in having matters disposed of.

E. Possible Constitutional Infirmities in the Scope of Judicial Review of the Board's Actions Have Been Corrected.

In *Maddox*, and again in *Walker*, the Court questioned the scope of review from decisions of the NRAB. The 1966 amendment modified Section 3, First, (m) and (p) so as

to, first make all awards final and binding upon *both* parties to the dispute (repealing a provision which gave the railroad the right to have a review de novo of a monetary award against it), and secondly, clearly establishing that an award would be conclusive unless the board failed to adhere to the requirements of the Act itself or failed to confine itself to matters within the scope of the Board's jurisdiction or was tainted by fraud or corruption by any member of the Division making the order. Senate Report No. 1201 accompanying the 1966 amendments noted that: "'Arbitariness' or 'capriciousness' have not been specifically included as a ground for setting aside an award, the committee assuming that the Federal courts would have the power to decline to enforce an award which was actually irrefutably without foundation in reason or fact, "and the committee contends, that under this bill, the courts will have that power." In other words, the so-called "any evidence" rule applies in review of Board awards. In any event, the scope of review is now substantially the same insofar as awards of the National Railroad Adjustment Board are concerned as it is for numerous other administrative awards and orders.

F. **The Remedies Available to Employees Under Judicial and Administrative Processes Are Substantially Identical.**

The third question previously presented by this Court requires more extended analysis. This goes to the comparability of the remedies available via the administrative route and those available in a court of law. We may start by defining what the administrative route may provide at maximum. It is well established that a Board may award full back pay up to the time of hearing, occasionally with interest. It may require the employee to account for money he has earned in the interim, crediting the railroad with that sum, and it may further order that all of his benefits,

retirement, etc., be treated as having continued in full force and effect, while he was, in fact, off the payroll. Beyond that, it may order him reinstated, with full seniority, which might allow him to "roll" a lower ranking employee out of the job usurped in his absence. Where there is an underlying dispute about his medical condition, the board can appoint an impartial medical committee to investigate the employee's physical condition. In fact, all these things were done in a case considered by the Court in 1965, *Gunther v. San Diego & A.E. Ry.*, 382 U.S. 257, 15 L. Ed.2d 308, 86 S.Ct. 368 (1965). It might be noted further that although *Gunther* ruled that the ruling of the Board on the amount of back pay due the employee could not be final, under the law as it then stood, that situation has now been reversed by virtue of the 1966 amendments, as discussed in (F) above. Thus, a Board can now completely dispose of the matter and thus there is no longer any need for a two-step fact finding procedure. At least, this is the interpretation presently being followed by the lower courts. See *Brotherhood of R.R. Trainmen v. Denver & G.W.R.R.*, 370 F.2d 833 (10th Cir. 1966) and *Sweeney v. Florida E.C. Ry.*, 389 F.2d 113 (5th Cir. 1968).

In fact, *Sweeney* strongly suggests that under some circumstances, a board award might not compel an accounting for money earned while in a state of discharge. It further suggests (at 389 F.2d 114) that a Board award could well result in interest, costs, and attorneys fees. A similar conclusion (as to deduction for outside earnings), is strongly suggested by *Brotherhood of Locomotive Engineers v. Louisville & N. R.R.*, 373 U.S. 33. Certainly, had it been a closed question whether the railroad could deduct wages earned in the interim, the union would have been contending in that case that the railroad had no standing to obtain injunctive relief on the ground that it was in bad faith in resisting the board award and, thus, had no equitable standing to obtain injunctive relief under the Norris-LaGuardia Act, Section 8.

On the other hand, if an employee abandons an administrative remedy and commences a court action, what is the scope of his possible recovery? Before analyzing the question, there must be some serious discussion as to the nature of this action. The employee in this case has continued at every level to raise some concept of a common law right of employment. No citation of authority has even been offered to substantiate any such right nor can we locate any such right under the law, at least of Georgia. Nor is any Federal law creating a relationship of employer-employee between two specific parties known to this railroad, nor is any means by which one may acquire employee rights absent a specific employment contract known to this railroad. The only rights any employee has growing out of his discharge are such rights as may accrue to him under his contract of employment. In other words, no contract—no rights. Georgia Code, Ann., § 66-101 prescribes:

> "That wages are payable at a stipulated period raises the presumption that the hiring is for such period; but, if anything in the contract shall show that the hiring was for a lesser term, the mere reservation of wages for a lesser time will not control. *Indefinite hiring may be terminated by either party.*" (Emphasis added.)

See also *Lambert v. Georgia Power Co.*, 181 Ga. 624, 183 S.E. 814 (1936), which states in Headnote 1 (Headnotes by the court are substantative law in Georgia):

> "An employee under a contract of hiring, indefinite in its duration, may lawfully be discharged at the will of his employer. A discharge under such circumstances affords no cause of action for breach of contract."

In other words, unless there is a specific contract, there is no such thing as wrongful discharge. When an employee

claims a common law right of action in a state court, what he is really claiming is an action for breach of contract. As this Court noted in *Moore*, such an action stands on a legally distinguishable ground from an action for specific performance under a contract because in an action for breach, the employee contends the breach is total, and he is suing for the full value of the remainder of the contract. Under the law of Georgia,

> "Damages recoverable for a breach of contract are such as arise naturally according to the usual course of things, and such as the parties contemplated, when the contract was made, as the probable result of its breach." Ga. Code, Ann. § 20-1407.

While this statute is not a masterpiece of precision, case law has defined this concept more precisely:

> "In other words, the person injured is, so far as it is possible by a monetary award, to be placed in the position he would have been in had the contract been performed." Georgia Power Co. v. Fruit Growers Express Co., 55 Ga. App. 520, 527, 190 S.E. 669 (1932), quoted approvingly in Bennett v. Associated Food Stores, Inc., 118 Ga. App. 711, 165 S.E.2d 581 (1968).

Interest may be recovered under the law of Georgia, for a breach of an employment contract, Ansley v. Jordan, 81 Ga. 482 (1878), Ga. Code, Ann. § 20-1408. So may attorneys' fees be recovered when the defendant has been especially litigious or has acted in bad faith, or has caused the plaintiff unnecessary trouble and expense. Ga. Code, Ann. § 20-1404. On the other hand, a plaintiff in a suit based on contract can never recover exemplary damages, Ga. Code, Ann. § 20-1405, while he must lessen the damages "as far as is practicable by the use of ordinary care and diligence." Ga. Code, Ann. § 20-1410.

Where the damages are alleged to have arisen as the result of the breach of an employment contract, the one

injured can only recover his salary for the remainder of the period less the amount he received in other employments for work during that period. As a matter of fact, the rule in Georgia is that the jury must consider not only what he did earn, but what the employee might have earned by the exercise of reasonable diligence. *Georgia, F. & A. Ry. v. Parsons,* 12 Ga. App. 180, 76 S.E. 1063 (1913); *Waynesboro Planing Mill v. Hargrove,* 33 Ga. App. 684, 127 S.E. 665 (1925). Indeed, one old Georgia case strongly suggests that an offer to re-employ the employee would be an acceptable method of showing a mitigation or diminishment of damages. See *Johnson v. Gorman,* 30 Ga. 612 (1860).

At the same time, there may be no recovery in Georgia for damages accruing to a railroad employee for loss of his right of seniority and because of his having been blacklisted or boycotted by other railroad companies and, thus, being unable to obtain other railroad employment because such damages are not readily computable, nor could he recover for loss of rights in a group insurance policy which was not specifically a part of the employment contract. Of course, today, employees receive a great number of employee benefits many of which are not specifically incorporated in employee contracts, but are, nevertheless, one of their conditions of employment. See *Gary v. Central of Georgia Ry.,* 37 Ga. App. 744, 141 S.E. 819 (1928).

These Georgia cases, of course, are merely illustrative of well known and long standing general rules governing damages for breach of employment contracts. See generally Williston on Contracts (3rd ed.), §§1358-61A; McCormick on Damages (1935), §§158-163.

Of particular interest are the cases noted in these two standard sources dealing with re-employment by the same employer. (See Note 7 to §1359 in Williston and Notes 22

and 23 in §160 of McCormick). In *Flickema v. Henry Kraker Co.*, 252 Mich. 406, 233 N.W. 362 (1930), it was held to be error not to charge that if defendants offered to take plaintiff back into their employ and plaintiff refused, the plaintiff could not recover. Such a charge would have amounted to an absolute statement that being put back to work at the same wages and at the same position would completely eliminate any other recovery of damages. This decision was supported by a number of older cases, and is not at all belied by some equally hoary cases which held that where the discharge had been under circumstances which would tend to create an unpleasant situation for the employee if he should return, his refusal to accept an offer of re-employment would not be unreasonable and he would not lose his chance to recover damages thereby. See *Price v. Davis*, 187 Mo. App. 1, 173 S.W. 64 (1914) and *Levin v. Standard Fashion Co.*, 16 Daly 404, 11 N.Y.S. 706 (1890); and an annotation on this whole subject at 72 A.L.R. 1049 (1931).

The significance of this whole discussion is that if the maximum recovery which an employee can make for damages in the future (as seen from the time of trial) is no more than what he would make if the employer reinstated him at his original salary and under the original conditions, then the remedy which is available through the National Railroad Arbitration Board is completely comparable and precisely that which may be obtained in a court of law. That is to say, if the Board may put him back to work, he will obtain exactly what he could obtain from a lawsuit. The employee is not entitled as a matter of law to a chance at a windfall on the possibility that a jury may err in his favor. He is only entitled to be made whole and that is precisely what the National Railroad Arbitration Board can do for him.

G. The Limitations Subsequently Placed Upon the Decision in *MOORE* Are Untenable in Theory and Practice.

Beyond these practical problems, in which the court has expressed an interest, and the development of case law in this area, there are sound legal reasons why *Moore* must be disavowed. Perhaps the primary one lies in an error which was made initially in *Moore,* and has become more and more perceptible in the cases since *Moore.* A discharge is merely a fact which gives rise to a cause of action. The cause of action is nothing but one for breach of contract. Yet, the cases have continually referred to a "cause of action for wrongful discharge" as if this were a species of lawsuit which could be readily identified and assigned to the courts without any intrusion upon the administrative sphere. More than that, the cases have impliedly suggested that a clear dividing line may be drawn between "suits for wrongful discharge" and other types of grievances. From this implication has flowed a conclusion that "suits for wrongful discharge" may be assigned, at the will of the employee, to either the administrative or judicial route, while other grievances must be mandatorily assigned to the administrative route, in accord with *Slocum v. Delaware.* That these assumptions are incorrect may be readily dispelled by a review of some fundamental principles of contract law, and a look at some of the cases which have relied upon *Moore* to find jurisdiction to decide matters far beyond the rights of an employee who has been wrongfully discharged.

The key to this question lies in a recognition that the action is simply one for breach of contract. A breach of an employment contract may arise in many different ways short of the employee's immediate supervisor informing the employee that he has been fired. A total breach of an employment contract may result from substantially

less flagrant action. As stated so succinctly in Simpson on Contracts (1954):

> "Any unjustified failure to perform when performance is due is a breach of contract which entitles the injured party to damages. If the breach is slight or insubstantial, it is called a partial breach, for which plaintiff's damages are restricted to compensation for the defective performance. *If the breach is material, it is called a total breach, which gives to the injured party an election to substitute for his contractual rights the remedial right to damages for total failure of performance.*" (Emphasis added.) At p. 501.

Further, it is well established that even where a breach is so material as to constitute a total breach, the injured party is not bound to treat it as such but always has the election. See *Williston on Contracts* (3rd Ed.) § 1292. The determination as to the materiality of one particular clause in a labor union contract from which the claim arises can only be made, of course, by looking at the warp and woof of the whole contract. Thus in cases where something less than an outright "you're fired" has occurred, Federal Courts are going to find themselves weighing and interpreting not just one clause but entire collective bargaining agreements. Yet, this is precisely what this Court in *Slocum* and time after time since has held is beyond the power, if not the wisdom, of Federal District Courts to do.

That this is not a chimerical concern is demonstrated by the legion of cases to the effect that an employer may discharge an employee by actions other than formal words of discharge. See *e. g. Putnam v. Lower*, 236 F. 2d 561 (9th Cir. 1956), and *Seckinger v. Riley*, 99 Ga. App. 442, 108 S.E. 2d 761 (1959). The latter case graphically illustrates the problems lurking in this area: *Riley* holds

that the failure to pay wages when due is such a breach of the employment contract as entitles an employee to treat it as terminated and himself as discharged. A substantial number of all cases that go to the National Railroad Arbitration Board and special boards and the Public Law Boards are claims for nothing more than wages or compensation allegedly due under some clause of these highly complex contracts, usually arising out of a claim that some other craft performed the employee's job, or that the employee making the claim did some extra work, or for extra mileage or some such melange of fact, law, and "custom". Are all these claims to now be triable in federal and state courts on the theory that by refusing to pay them the employer breached the contract and the employee may consider it terminated?

The instant case is a good illustration of the pitfalls that lie ahead in the event *Moore* should be flatly affirmed. It will be recalled that the plaintiff here makes two contentions: First, that he was wrongfully discharged, and secondly, that he was not put back to work when his doctor said he was ready to go back to work. It would reasonably seem to appear that the first claim is really a claim that the railroad's failure to give him work when he was physically able to work is such a material breach of the employment contract that the employee is entitled to treat the entire contract as repudiated. Thus, we start down the long, slippery slope of letting a court decide, in a case where the man has not actually been discharged, as ordinary people use the term, of just how much of a breach of the employment contract may occur before the breach becomes so material that the employee can claim he has been "discharged".

Alternatively, at the end of the trial, if the Court finds the employee has not been discharged, is the Court to then decide that it wrongfully accepted jurisdiction to begin

with. Presumably it would have to do so, because if he has not been discharged, then the claim turns on whether he is or is not on some peculiar type of medical furlough list and whether he is rightfully or wrongfully on that list. There is nothing in *Moore* which states the court may adjudicate that matter, but a great deal in *Slocum* which says that is a matter solely for the National Railroad Arbitration Board. Indeed, that was precisely the factual point which *was* decided by the National Railroad Arbitration Board in *Gunther v. San Diego & A.E.Ry.*, 382 U.S. 257.

It is a well established proposition that a court always has jurisdiction to determine its jurisdiction. Thus, if *Moore* be good law, all an employee really need do is to allege, as this one has, that he has been wrongfully discharged (a fact) and he automatically has a claim justiciable in court. And it need not be emphasized too much that the burden of determining whether, in fact, he has been discharged may well be as great, if not greater, than the burden of determining if the discharge was wrongful. As the Georgia Supreme Court has said, "A court having jurisdiction does not have jurisdiction only of good causes but also of bad causes." That comment arose from a case in which that Court held that jurisdiction had been created by the plaintiff's pleading, not that he had been wrongfully discharged, but that he was about to suffer irreparable injury as a result of the railroad's intention to put into effect certain plans relating to (firemen's) firing assignments, which it was alleged were in violation of the collective bargaining agreement. *Central of Georgia Ry. v. Culpepper*, 209 Ga. 844, 76 S.E.2d 482 (1953). The Georgia Supreme Court looked beyond the facts in *Moore* to define the cause of action allowed therein, breach of contract, and then simply applied well established theories to the case before it in declaring that the suit was one primarily for the redress of a completed wrong or to prevent a wrong which would re-

sult in irreparable injury to the petitioner. Beyond that, the Georgia court looked to this Court as its source of law as to whether or not the National Railroad Adjustment Board, in particular, had exclusive primary jurisdiction of cases arising out of railway labor contracts. Rather than construct or apply a general Georgia law based on state practice and theory concerning exhaustion of administrative remedies on a broad basis, the Georgia court looked to the specific case of what this Court had said in *Moore* about the NRAB and held that no exhaustion was required. Thus, the underpinning of *Koppal* as a limitation on *Moore* was effectively destroyed, since *Koppal* stated that Federal courts should look to the State courts for a rule on exhaustion of administrative remedies. That obviously does little good if the state courts in turn will look to this Court's decision in *Moore* as to the status of the NRAB.

In summary on this point, the Court's attempt to limit jurisdiction of *Moore* type cases on a factual rather than cause of action basis has in reality succeeded in only confusing the Railway Labor picture and the time is ripe to end that confusion. It may well be argued that other grounds of federal jurisdiction are equally based on "facts" such as diversity of citizenship and the amount of damages sought. That may well be, but citizenship is a matter which can usually, except in the extraordinary case, be resolved in relatively early stages of litigation and the amount of damages sought is not an ultimate fact to be proven in the case but one determinable from the face of the pleadings. It would seem that to be logically consistent, if the Court cannot simply do away with *Moore*, at least it should amend it to declare that any cause of action which *alleges* a total breach of the employment contract is within the jurisdiction of the Federal court, rather than as now apparently let jurisdiction depend upon the ultimate facts proven.

H. **A Recent Decision by This Court Is Consistent With the Railroad's Position.**

The employee in this case has contended that *United States Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 27 L. Ed. 456, 91 S. Ct. 409 (1971) in some fashion supports his contentions. In that case, a seaman brought a wage claim in District Court, which assumed jurisdiction on the ground that the claim for seaman's wages and an additional penalty was based on an express federal statute, 46 U.S.C. § 596, and that the action was thus within the federal court's admiralty or maritime jurisdiction. However, the seaman was also the beneficiary of a collective bargaining contract which provided a grievance procedure and for ultimate arbitration of any disputes. The court held that Section 301 of the LMRA, *Lincoln Mills* and *Maddox* did not cumulatively destroy the seaman's right to judicial redress for his wage claim, primarily on the ground that the seaman's wage claims were protected by an "express judicial remedy created by § 596". 400 U.S. at 357.

It may be useful to consider the other opinions. Justice Harlan, who joined in the majority opinion, concurred and noted further that "the mere provision by Federal statute of a judicial forum for enforcement of the wage claims of a sub-class of workers [does not] forego application of the arbitration principles of [*Lincoln Mills* and *Maddox*]; nor do I understand the Court's opinion today to so hold." 400 U.S. at 358. Justice Harlan, however, in accord with his dissenting reasoning in *Walker*, explained his vote with the majority in *Arguelles* on the ground that Arguelles' suit, unlike Maddox' claim, was not simply "on the contract"; Arguelles was also seeking a statutory claim for refusal or neglect to pay his wages. This, of course, was purely a statutory right and under those circumstances the arbitral remedy was not compre-

hensive. Justice Harlan further found a Congressional policy favoring promptness in the payment of seamen's wages. Under these circumstances, it was the least desirable of all solutions to create a necessity for proceeding in both the arbitral and judicial forums to obtain a complete recovery, and thus the legislative policy could best be reconciled by giving the seaman an option to choose between the forums when he stated a claim under both the contract and under 46 U.S.C. § 596.

Justices White, Brennan, Stewart and Marshall, dissented on the ground that, essentially, there were substantial factual questions underlying the seaman's claim, which could only be resolved by reference to the collective bargaining agreement. They noted that those questions were particularly within the competence of the established grievance procedure of the collective bargaining agreements, being all questions of fact or interpretations of various provisions of the agreement.

Considering the majority opinion, Justice Harlan's concurrence, and the dissenting opinion together, it would appear that but for the sole fact that the seaman was pursuing an additional statutory penalty, there could as well have been at least a five-four majority in favor of relegating the seaman to an exhaustion of the grievance and arbitration procedures under his contract, even though a federal statute expressly protected his wage claims, *per se*. Thus, *Arguelles* becomes very shaky authority indeed for the plaintiff here to rely upon, or even to mention, as it seems in its reasoning to actually support the railroad's position.

I. Some Miscellaneous Considerations Should Be Laid to Rest.

We should deal with some considerations that have been raised by this Court in previous opinions in this area. In *Moore*, the Circuit Court below stated that Moore's claim

essentially rested upon the interpretation and application of the collective bargaining contract of an interstate railroad with its employees. That question was not discussed when this Court ruled in *Moore;* however, in *Slocum,* this Court's retrospective analysis of *Moore* noted that an action "for wrongful discharge" did *not* involve questions of future relations between the railroad and its other employees, and the Court's interpretation would "of course have no binding effect on future interpretations by the Board." 339 U.S. at 244. Although this statement was repeated and quoted verbatim in *Koppal,* restatements alone neither provide this dicta with any satisfying reasoning nor enhance its authority. Indeed, only four years after *Koppal,* in *Lincoln Mills,* this Court was already questioning those facets of the decisions of *Moore* and *Koppal.* See 353 U.S. at 459, note 9.

Neither of these statements is really well founded. It somewhat beggars the imagination to understand how a decision by a Federal court, in the event it had to determine the significance or meaning of a part of the collective bargaining contract, and did so (interpretation of contracts being a normal function of courts), would not make a decision that would be persuasive if not binding on the NRAB; particularly would this be so in the event that decision by a District Court were appealed to a Circuit Court, and ultimately to this Court. Does this Court mean that its decisions as to interpretations of contracts in the collective bargaining area would not be binding on the National Railroad Arbitration Board in the event it reconsidered the same contract in another case. We would hardly think that that is a tenable position.

The second part of the *Slocum* dictum, namely that questions arising in the course of litigation over a wrongful discharge would not involve questions of future relations between the railroad and its other employees is equally dubious. Obviously, any interpretation of a con-

tract, whether arising in the abstract, over the rights of one employee, or over the rights of all, is going to become a part of that contract. And if it becomes a part of that contract, it, of course, *is* going to affect the future relations between the remaining employees and the employer. In the case at hand, for instance, there is apparently a dispute over whether the employee is in fact discharged, or whether he is on an extended furlough list due to his physical condition. Presumably, if tried, the plaintiff will be contending that he has not been properly put on that list and thus he must have been discharged. Alternatively, there will be a dispute about the propriety and evaluation of the various medical examinations that seem to have taken place. These questions can only be resolved by reference to the contract, and, when resolved, they will form part of the "common law" of that contract. Arguelles could as well have been a railway worker, claiming a total breach of his contract for failure to pay wages; could his claim be settled without interpreting and applying an apparently disputed part of the contract?

Beyond this, there is a further serious problem ahead. What law is to be applied to the interpretation of these contracts? Under *Central Airlines,* and the theory of *Lincoln Mills,* such collective bargaining contracts are to be interpreted by a sort of Federal common law of collective bargaining contracts. The only place such law now exists is in the various reports of the NRAB. If the courts are not to follow these but are to create their own common law, we have the obvious probability of generating two different lines of authority and two different interpretations of the same contract, giving rise to forum shopping of the worst nature. Yet, to avoid this, are the courts merely to follow the interpretations of the administrative agencies? If so, why not let the administrative agency which has the admitted expertise in this area handle the problem in the first place. Clearly the suggestion that dis-

charge suits do not involve future relations between employer and employee does not hold water. Even if it were rationally correct, that is not the policy which this Court applied in *Maddox*. In that case it will be recalled, this Court held that where the dispute was one over severance pay, and the company had apparently closed its operation and presumably there were no employees left in that bargaining unit, arbitration would still be a required prerequisite to judicial intervention. The Court noted:

> "Only in the situation in which no employees represented by the union remain employed, as would be the case with a final and permanent plant shutdown, is there no possibility of a work stoppage resulting from a severance-pay claim." 379 U.S. at 650.

The congressional policy underpinning the Railway Labor Act, namely the prevention of unnecessary work stoppages, is, if anything, even stronger in that case than with reference to the non-railway labor field. Thus, if the potential of a dispute to create unnecessary work stoppages is any criterion, disputes over severance pay and discharges (which are practically inseparable) clearly ought to be under the umbrella of compulsory arbitration, rather than allowing them to be the subject of litigation at will.

There is another major reason why it would be inappropriate to continue to allow such suits as this to be brought in federal court. This Court has on more than one occasion questioned and inferentially criticized the one-sided review of decisions of the Adjustment Board allowed prior to the 1966 amendments. Prior to that time, the railroad could obtain a review where there was a money award made to the employee, but the employee could not obtain a review of the failure of the Board to grant him a money award. This criticism was fair and correct, and Congress rectified it in 1966. But it has a corrolary to the present issue. If an employee is to be allowed to proceed

to court at his option, in the event he wishes to claim he has been discharged, is not a railroad entitled to initiate judicial proceedings seeking a declaratory judgment of its right to fire one or more particular employees? And if so, how is the employee to defend his rights? Is he to be forced to hire an attorney, or is the union treasury to be burdened with this expense? (This could be a unique form of punishment, in certain situations.) If the railroad is first to the courthouse, does this divest the employee of his grievance and arbitration procedures on the ground that the matter is presently before the alternative forum? It is difficult to conceive of a more enervating illness which could be inflicted upon the Railway Labor Act than to encourage such a procedure. Yet, that would seem to be a necessary implication of an outright affirmance of *Moore*. As a practical matter, railroad counsel have at least since Lincoln Mills, in 1957, considered *Moore* to be on extremely shaky grounds. An outright affirmance of *Moore* at this point might well lead to some major reconsideration of the appropriate procedures to be followed when an employee is sought to be discharged. A declaratory judgment procedure might be particularly desirable since the railroad could keep an employee on the job and only lose its legal fees if it lost, while under the present administrative procedure, it might have to pay three to six months back wages for time not worked. Of course, the savings are not substantial on a single employee basis, but they accumulate rapidly if the rights of several employees can be adjudicated at once.

This railroad does not suggest we would follow any such practice, but the Court must consider the logical extension of its rulings in the light of the internecine warfare in this industry for the last hundred years. Had this case arisen as the result of this railroad's having filed a declaratory judgment action seeking clarification of its right to discharge a half-dozen employees, the true

shakiness of the foundations of *Moore* would be readily apparent.

Finally, this Court has suggested on occasion that a union would not necessarily be interested in processing a discharge grievance for an employee who has been discharged and who is not on hand to spur the union on. This argument could as well have been made in *Pennsylvania R. R. v. Day*, 360 U.S. 548, 3 L. Ed. 2d 1422, 70 S. Ct. 1322 (1959), dealing with whether or not the board had exclusive primary jurisdiction of the claim of a retired employee for extra compensation he had earned while employed. The majority of this Court held that the Board did have exclusive primary jurisdiction, and that the retired employee could not press his claim judicially at his option. Certainly that question, if it were a serious one, could have been applicable there to allow him to litigate, for a retired employee is, so far as being in day-to-day touch with his union officers and being in any position to exert pressure on them, in exactly the same status as an employee who has been discharged. Beyond this, the case is actually stronger in the situation in which many railroad workers find themselves. In the railroad industry, there are numerous unions competing for the employee dues dollar. The Thirty-Seventh Annual Report of the National Mediation Board (Table 10) shows the effect of this competition. Among at least the engineers, firemen and hostlers, yardmasters, dispatchers, signalmen, mechanical foremen and supervisors, dining room stewards, dining car cooks and waiters, carmen and coach cleaners, not to mention the various airline and maritime crafts, there is obviously substantial competition between different unions within the same craft. An employee already signed up by a given union is a bird in the hand; his replacement's allegiance is a bird in the bush. The situation is, of course, different with the typical industrial union, which is not normally engaged in a fight for em-

ployee allegiance except in the purely open shop states. Under union and agency shop agreements, all employees will become union members (or pay the equivalent dues) and the identity of the particular employee is of no great significance. Yet, if industrial unions can be entrusted to pursue discharge claims for their members, as they can under *Maddox,* it makes little sense not to assume that railway unions will be at least as diligent on behalf of their members.

The question has occasionally been raised by this Court, most commonly in dissenting opinions having to do with the functioning of the National Railroad Adjustment Board, as to the remedy for the employee who is unable to get his union to prosecute his case vigorously. It should be noted that all the Court has ruled in the non-Railway Act cases is that the employee is required to *attempt* to exhaust his administrative remedies before he is allowed to litigate the matter. See *Republic Steel Corp. v. Maddox,* 379 U.S. 650 at 668-669. However, under the Railway Labor Act, an individual employee is specifically authorized to prosecute his own grievance before the National Railr. Adjustment Board, whether his union wishes to represent him or not. In fact, during the fiscal year ending June 30, 1971, the First Division of the Board docketed sixteen cases filed by individuals, and only 53 by unions. For the Second Division, the figures were 11 and 151, respectively, while the figures are not entirely clear for the Third and Fourth Divisions. Thirty-Seventh Annual Report of the National Mediation Board, pp. 70, 71, 74, 76. To be sure, it does not appear that an individual employee is entitled to have a special board convened to hear his solitary grievance under the terms of the 1966 amendment. That right is apparently only held by the representative of the craft or class of employees. Section 3, Second, as amended in 1966. However, when it is considered that each party to the dispute pays his own board member, it is not unreason-

able for Congress to have limited the authority to convene a special board to those who are presumably responsible and able to pay for them, at least so long as the employee is able to pursue his remedy before the NRAB without cost to himself. Should the Board unduly delay in handling a particular individual's request, who does not have the remedy of a special board of adjustment, it would appear that in line with previous holdings he has *attempted* to use the administrative remedy and it has proved unavailing in his case. However, at the rate at which even the First Division is catching up on its backlog, it would seem that there would be few occasions when a court would realistically be justified in ruling that the administrative remedy was unreasonably delayed in a particular case. Delay is a feature of all forums, and particular cases may sometimes be long drawn out in court as well. The question before this Court, one would think, would be whether the system as a whole is designed to function with reasonable efficiency in handling and disposing of grievances. There is no evidence to suggest that it is not doing exactly that at this time.

VIII

CONCLUSION

There seems to be little point in rehashing the numerous cases in which this Court has indicated its faith in the procedures and wisdom of the National Railroad Adjustment Board in handling every other type of grievance except discharge matters. Those same conclusions could as well be drawn and applied to grievances arising out of discharges. The only question is whether the courts should be made available as an alternate primary forum. In conclusion and by way of summary, the railroad here contends that *Moore* was decided prior to the clear delineation and in-depth investigation of the balance between

voluntary and compulsory compliance with the Railway Labor Act's procedures made in *Slocum*. Upon the first detailed examination of the Railway Labor Act, in *Slocum*, this Court attempted to limit *Moore* by describing *Moore* as a suit for "wrongful discharge". In *Koppal*, this Court again limited *Moore* by constructing a retrospective rationale that *Moore* was decided as a matter of state law and under the state law of Mississippi no exhaustion of alternative primary remedies was required. However, *Central Airlines* cut the ground out from under that distinction by holding in effect that contracts under the Railway Labor Act were now to be determined by Federal substantive law, and not state law. Thus contracts under the Railway Labor Act were to be interpreted in the future as were contracts under the Labor-Management Relations Act, by reference to a Federal common-law of collective bargaining contracts. *Maddox* declared that for claims arising out of collective bargaining agreements under the Labor-Management Relations Act, an employee who had been discharged could not sue his employer for his severance pay, a right clearly growing out of his discharge and based on the contract, because he had not exhausted the grievance procedures provided by the agreement. In *Walker v. Southern Railway Company*, this Court indicated that but for certain deficiencies in the operation of the National Railroad Adjustment Board, it would probably have overruled *Moore* in 1966. Those deficiencies have since been solved and the Act modified to provide for equal review for both sides. The plaintiff here has never attempted to pursue his remedies under the Act, although there is no question but that they are fully available to him.[1] Should plaintiff wish to pursue his admin-

[1] The railroad is aware that hard cases make bad law, and would like to point out that whatever the contract may call for in the way of time limits for challenging various decisions, etc., the railroad has contended that it will put the employee back to work whenever he is physically able. Each new refusal to

istrative remedies, there is no indication he could not obtain a Public Law board able to dispose of this case in a matter of months, or if he wishes to pursue the original remedy before the NRAB, he should be able to obtain a hearing in a reasonably prompt order. This is the procedure followed for every other kind of grievance, and there seems to be no sound reason now for requiring every other kind of dispute arising under a collective bargaining agreement, whether under LMRA or the Railway Labor Act to be initially disposed of in an administrative tribunal, except for the limited case when an employee under the Railway Labor Act *claims* he has been wrongfully discharged.

An action for "wrongful discharge" is nothing more than an action for total breach of contract, and this Court should either rule that all such actions are within the primary exclusive jurisdiction of the Board, or that all actions for total breach of the employment contract may be tried alternatively in court. To merely state that proposition is to show its undesirability, for jurisdiction of all actions for total breach includes jurisdiction to determine jurisdiction, and a court will thus have jurisdiction to determine if a total breach has occurred; where a breach of the employment contract may arise in many cases falling far short of an outright discharge, this is inevitably going to plunge the federal courts into the very business of interpreting and analyzing collective bargaining agreements that this Court has found so distasteful in *Slocum* and all of its progeny.

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put the employee back to work would constitute a new starting point from which the contract grievance procedure might be begun. Under the circumstances, of course, the railroad being estopped to contend that he was discharged, the plaintiff still has available to him the full range of contract and statutory administrative remedies whenever he wishes to use them. Thus, the plaintiff has suffered no disadvantage from having pursued this route in the event this Court should now decide to reverse its position in Moore.

Under these circumstances, Congressional policy indicating the clear preference for the peaceful and compulsory resolution of disputes arising under collective bargaining agreements should be adhered to, and plaintiff allowed to pursue his administrative remedy exclusively. The original foundations of the *Moore* decision having been totally eroded by *Koppal* and *Central Airlines,* it is not even necessary to explicitly reverse *Moore;. Moore* can be interpreted out of existence in light of *Maddox* and *Slocum* and there seems to be no serious reason why it is not time to take that step and end this useless but provocative anomaly, once and for all.

Respectfully submitted

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APPENDIX A

PUBLIC LAW 89-456; 80 STAT. 208
[H. R. 706]

An Act to amend the Railway Labor Act in order to provide for establishment of special adjustment boards upon the request either of representatives of employees or of carriers to resolve disputes otherwise referable to the National Railroad Adjustment Board, and to make all awards of such Board final.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Section 3, Second, of the Railway Labor Act is amended by adding at the end thereof the following:

"If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as

provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such

request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board."

Sec. 2. (a) The second sentence of section 3, First (m), of the Railway Labor Act is amended by striking out ", except insofar as they shall contain a money award".

(b) Section 3, First, (o), of the Railway Labor Act is amended by adding at the end thereof the following new sentence: "In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination."

(c) The second sentence of section 3, First, (p), of such Act is amended by striking out "shall be prima facie evidence of the facts therein stated" and inserting in lieu thereof "shall be conclusive on the parties".

(d) The last sentence of section 3, First, (p), of such Act is amended by inserting before the period at the end thereof the following: ": *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order".

(e) Section 3, First, of such Act is further amended by redesignating paragraphs (q) through (w) thereof as paragraphs (r) through (x), respectively, and by inserting after paragraph (p) the following new paragraph:

"(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code."

Approved June 20, 1966.

APPENDIX B

PUBLIC LAW 91-234; 84 STAT. 199
[H. R. 15349]

An Act to amend the Railway Labor Act in order to change the number of carrier representatives and labor organization representatives on the National Railroad Adjustment Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Subsection (a) of section 3, First, of the Railway Labor Act is amended by striking out "thirty-six members, eighteen of whom shall be selected by the carriers and eighteen" and inserting in lieu thereof "thirty-four members, seventeen of whom shall be selected by the carriers and seventeen."

Sec. 2. Subsection (b) of said section 3, First, is amended by inserting the word "voting" ahead of the words "representative on any division of the Board."

Sec. 3. Subsection (c) of said section 3, First, is amended by adding the following at the start thereof: "Except as provided in the second paragraph of subsection (h) of this section," and inserting the word "voting" ahead of the words "representative on any division of the Board."

Sec. 4. The second paragraph of subsection (h) of said section 3, First, is amended by amending the last sentence thereof to read as follows: "This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be

selected and designated by the labor organizations, national in scope and organized in accordance with section 2 hereof and which represent employees in engine, train, yard, or hostling service: *Provided, however,* That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however,* That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division."

Sec. 5. Subsection (k) of said section 3, First, is amended by inserting the words "except as provided in paragraph (h) of this section," after the words "*Provided, however,* That."

Sec. 6. Subsection (n) of said section 3, First, is amended by inserting the words "eligible to vote" after the words "Adjustment Board."

Approved April 23, 1970.

APPENDIX C

RAILWAY LABOR ACT, SECTIONS 1, 1a, 2 AND 3

45 U.S.C.A. § 151. Definitions

When used in this chapter and section 225 of Title 28 and for the purposes of said chapter and section—

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple,

and the operation of equipment or facilities therefor, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this chapter.

Third. The term "Mediation Board" means the National Mediation Board created by this chapter.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the United States District Court for the District of Columbia; and the term "court of appeals" includes the United States Court of Appeals for the District of Columbia.

* * * * * * *

45 U.S.C.A. § 151a. General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

* * * * * * *

45 U.S.C.A. § 152. General duties—Duty of carriers and employees to settle disputes

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Consideration of disputes by representatives

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Designation of representatives

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier. . . .

* * * * * * *

Conference of representatives; time; place; private agreements

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title . . ."

* * * * * * *

45 U.S.C.A. § 153 (Prior to 1966 Amendment) National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions; hearings and awards

First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organization, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 152 of this title and is otherwise properly qualified to participate

in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dis-

patchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to con-

duct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(*l*) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the

cause of action accrues under the award of the division of the Adjustment Board, and not after.

(r) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(s) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(t) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(u) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the un-

expired term by the selection of a successor from the same group.

(v) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (*l*) of this section, with respect to a division of the Adjustment Board.

Establishment of system, group, or regional boards by voluntary agreement

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

* * * * * * *

APPENDIX D

Section 8, Norris-LaGuardia Act, 47 Stat. 72, 29 U.S.C.A. § 108. Noncompliance with obligations involved in labor disputes or failure to settle by negotiation or arbitration as preventing injunctive relief.

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration. Mar. 23, 1932, c. 90, § 8, 47 Stat. 72.

APPENDIX E

GEORGIA CODE, ANN. § 20-1404 EXPENSES OF LITIGATION

The expenses of litigation are not generally allowed as a part of the damages; but if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

GEORGIA CODE, ANN. § 20-1405 EXEMPLARY DAMAGES

Exemplary damages can never be allowed in cases arising on contracts.

GEORGIA CODE, ANN. § 20-1407. DAMAGES CONTEMPLATED BY PARTIES

Damages recoverable for a breach of contract are such as arise naturally and according to the usual course of things from such breach, and such as the parties contemplated, when the contract was made, as the probable result of its breach.

GEORGIA CODE, ANN. § 20-1408 INTEREST

In all cases where an amount ascertained would be the damages at the time of the breach, it may be increased by the addition of legal interest from that time until the recovery.

GEORGIA CODE, ANN. § 20-1410. PLAINTIFF BOUND TO LESSEN DAMAGES

Where by a breach of contract one is injured, he is bound to lessen the damages as far as is practicable by the use of ordinary care and diligence.

APPENDIX F

SUMMARY OF TABLE 9, THIRTY-FIFTH AND THIRTY-SEVENTH ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD

Including The Report of The National Railroad Adjustment Board

ALL DIVISIONS

Cases	Fiscal Year						
	1965	1966	1967	1968	1969	1970	1971
Open and on hand at beginning of period	6,559	6,245	6,090	5,346	5,024	4,277	3,692
New cases docketed	1,571	1,554	1,689	1,395	978	[sic] 921	882
Total number of cases on hand and docketed	8,130	7,799	7,778	6,741	6,002	5,198	4,574
Cases disposed of	1,884	1,709	2,433	1,717	1,724	1,506	1,559
Decided	1,335	1,306	1,438	1,214	1,126	837	939
Withdrawn	559	403	995	503	598	669	618
Open cases on hand close of period	6,245	6,090	5,346	5,024	4,278	3,692	3,015

FIRST DIVISION

Cases	Fiscal Year						
	1965	1966	1967	1968	1969	1970	1971
Open and on hand at beginning of period	4,062	4,056	4,049	3,509	3,299	2,940	2,650
New cases docketed	564	490	446	358	164	192	69
Total number of cases on hand and docketed	4,626	4,546	2,719	3,132	3,463	3,867	4,495
Cases disposed of	570	497	665	482	523	568	986
Decided	220	237	187	39	98	250	242
Withdrawn	350	260	478	443	425	318	744
Open cases on hand close of period	4,056	4,049	3,509	3,299	2,940	2,650	2,054

SECOND DIVISION

Cases	Fiscal Year						
	1965	1966	1967	1968	1969	1970	1971
Open and on hand at beginning of period	270	286	337	380	304	186	156
New cases docketed	205	238	338	211	138	179	162
Total number of cases on hand and docketed	475	524	675	591	442	365	318
Cases disposed of	189	187	295	287	256	209	181
Decided	184	156	265	272	253	196	171
Withdrawn	5	31	30	15	3	13	10
Open cases on hand close of period	286	337	380	304	186	156	137

THIRD DIVISION

Cases	Fiscal Year						
	1965	1966	1967	1968	1969	1970	1971
Open and on hand at beginning of period	2,196	1,872	1,666	1,361	1,324	1,087	829
New cases docketed	693	719	776	715	578	470	565
Total number of cases on hand and docketed	2,889	2,591	2,442	2,076	1,902	1,557	1,394
Cases disposed of	1,017	925	1,081	751	815	728	615
Decided	841	841	872	597	665	532	502
Withdrawn	176	84	209	154	150	196	111
Open cases on hand close of period	1,872	1,666	1,361	1,324	1,087	829	779

FOURTH DIVISION

Cases	Fiscal Year						
	1965	1966	1967	1968	1969	1970	1971
Open and on hand at beginning of period	31	32	39	97	97	64	57
New cases docketed	109	107	129	111	98	80	86
Total number of cases on hand and docketed	146	139	168	208	195	144	143
Cases disposed of	108	106	71	111	131	87	98
Decided	80	72	59	95	110	70	79
Withdrawn	28	28	12	16	21	17	19
Open cases on hand close of period	32	39	97	97	64	57	45

ANDREWS *v.* LOUISVILLE & NASHVILLE RAILROAD CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71-300. Argued March 22, 1972—Decided May 15, 1972

Petitioner, claiming that he was wrongfully discharged from his employment by respondent railroad, filed a state-court action based on state law for breach of contract. The suit was removed to Federal District Court which dismissed the complaint for failure to exhaust the remedies provided by the Railway Labor Act, and the Court of Appeals affirmed. *Held:* Since the source of petitioner's right not to be discharged and of his employer's obligation to restore him to his regular employment following an injury is the collective-bargaining agreement, petitioner must follow the grievance and arbitration procedures set forth in the Railway Labor Act. *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, overruled. Pp. 321-326.

441 F. 2d 1222, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 326. POWELL, J., took no part in the consideration or decision of the case.

Andrew W. Estes argued the cause for petitioner. With him on the brief was *James E. Slaton*.

William H. Major argued the cause for respondents. With him on the brief were *Lamar W. Sizemore* and *Robert G. Young*.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner brought suit in the state trial court of Georgia seeking damages for alleged "wrongful discharge"

by the respondent.* He alleged that prior to an auto accident in 1967, he had been an employee in good standing of the respondent, employed "under specified conditions and with a stipulated schedule of benefits." He alleged that following the accident, he had fully recovered and was physically able to resume his work for respondent, but that respondent had refused to allow him to return to work, and that respondent's actions amounted to a wrongful discharge. He prayed for damages consisting of loss of past and future earnings and for attorneys' fees. Respondent removed the case to the United States District Court and there moved to dismiss the complaint for failure to exhaust the remedies provided by the § 3 First (i) of the Railway Labor Act, 44 Stat. 579, as amended, 48 Stat. 1191, 45 U. S. C. § 153 First (i). See also 1966 amendments to § 3 Second, 80 Stat. 208. The District Court granted the motion, and the Court of Appeals for the Fifth Circuit affirmed. We granted certiorari, 404 U. S. 955, and are once more confronted with the question of whether *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630 (1941), should be overruled.

Moore held that a railroad employee who elected to treat his employer's breach of the employment contract as a discharge was not required to resort to the remedies afforded under the Railway Labor Act for adjustment and arbitration of grievances, but was free to commence in state court an action based on state law for breach of contract. The result was supported by the Court's conclusion that the procedures for adjustment of "minor

*References throughout the opinion to respondent are to the Georgia Railroad Co., which consisted of properties leased by Louisville & Nashville Railroad Co. and Seaboard Coastline Railroad Co. The petitioner alleged in his complaint that the Georgia Railroad Co. had refused to allow him to return to work.

disputes" under the Railway Labor Act had been intended by Congress to be optional, not compulsory, and that therefore a State was free to accord an alternative remedy to a discharged railroad employee under its law of contracts. The basic holding of *Moore* was reaffirmed and its state law aspects amplified in *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U. S. 653 (1953). There it was held that if state law required the employee to exhaust administrative remedies provided for in his contract of employment before resorting to court, a federal diversity court should enforce that requirement.

Later cases from this Court have repudiated the reasoning advanced in support of the result reached in *Moore* v. *Illinois Central*, *supra*. Fifteen years ago, in *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.*, 353 U. S. 30, 39 (1957), this Court canvassed the relevant legislative history and said:

> "This record is convincing that there was general understanding between both the supporters and the opponents of the 1934 amendment that the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field."

When the issue was again before the Court in *Walker* v. *Southern R. Co.*, 385 U. S. 196 (1966), it was observed:

> "Provision for arbitration of a discharge grievance, a minor dispute, is not a matter of voluntary agreement under the Railway Labor Act; the Act compels the parties to arbitrate minor disputes before the National Railroad Adjustment Board established under the Act." 385 U. S., at 198.

Thus, the notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law.

The related doctrine expressed in *Moore* and *Koppal*, that a railroad employee's action for breach of an employment contract is created and governed by state law, has been likewise undercut by later decisions. In *Machinists* v. *Central Airlines*, 372 U. S. 682 (1963), an agreement required under § 204 of the Railway Labor Act was said to be "like the Labor Management Relations Act § 301 contract . . . a federal contract and . . . therefore governed and enforceable by federal law, in the federal courts." 372 U. S., at 692. A similar result was reached under § 301 (a) of the Labor Management Relations Act in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957).

In *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650 (1965), the Court deduced from the Labor Management Relations Act a preference for the settlement of disputes in accordance with contractually agreed-upon arbitration procedures. It accordingly held that before a state court action could be maintained for breach of such a contract, the employee must first "*attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress." 379 U. S., at 652. In *Maddox*, the Court not only refused to extend *Moore* to save state court actions for breach of contract under § 301 of the Labor Management Relations Act, but intimated that its rule might well not survive even in Railway Labor Act cases. Indeed, since the compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that between petitioner and respondent stems not from any contractual undertaking between the parties but from the Act itself, the case for insisting on resort to those remedies is if anything stronger in cases arising under that Act than it is in cases arising under § 301 of the EMRA.

The fact that petitioner characterizes his claim as one for "wrongful discharge" does not save it from the Act's

mandatory provisions for the processing of grievances. Petitioner argues that his election to sever his connection with the employer and treat the latter's alleged breach of the employment contract as a "discharge" renders his claim sufficiently different from the normal disputes over the interpretation of a collective-bargaining agreement to warrant carving out an exception to the otherwise mandatory rule for the submission of disputes to the Board. But the very concept of "wrongful discharge" implies some sort of statutory or contractual standard that modifies the traditional common-law rule that a contract of employment is terminable by either party at will. Here it is conceded by all that the only source of petitioner's right not to be discharged, and therefore to treat an alleged discharge as a "wrongful" one that entitles him to damages, is the collective-bargaining agreement between the employer and the union. Respondent in this case vigorously disputes any intent on its part to discharge petitioner, and the pleadings indicate that the disagreement turns on the extent of respondent's obligation to restore petitioner to his regular duties following injury in an automobile accident. The existence and extent of such an obligation in a case such as this will depend on the interpretation of the collective-bargaining agreement. Thus petitioner's claim, and respondent's disallowance of it, stem from differing interpretations of the collective-bargaining agreement. The fact that petitioner intends to hereafter seek employment elsewhere does not make his present claim against his employer any the less a dispute as to the interpretation of a collective-bargaining agreement. His claim is therefore subject to the Act's requirement that it be submitted to the Board for adjustment.

The constitutional issue discussed in the dissent was not set forth as a "question presented for review" in the

petition for certiorari, and therefore our Rule 23 (1)(c) precludes our consideration of it. "We do not reach for constitutional questions not raised by the parties." *Mazer* v. *Stein*, 347 U. S. 201, 206 n. 5 (1954).

The term "exhaustion of administrative remedies" in its broader sense may be an entirely appropriate description of the obligation of both the employee and carrier under the Railway Labor Act to resort to dispute settlement procedures provided by that Act. It is clear, however, that in at least some situations the Act makes the federal administrative remedy exclusive, rather than merely requiring exhaustion of remedies in one forum before resorting to another. A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding. *Union Pacific R. Co.* v. *Price*, 360 U. S. 601 (1959). He is limited to the judicial review of the Board's proceedings that the Act itself provides. *Gunther* v. *San Diego & A. E. R. Co.*, 382 U. S. 257 (1965). In such a case the proceedings afforded by 45 U. S. C. § 153 First (i), will be the only remedy available to the aggrieved party.

In *Walker* v. *Southern R. Co.*, 385 U. S. 196 (1966), the Court noted that there had been complaints not only about the long delay in processing of grievances on the part of the Adjustment Boards, but also about the fact that a more extensive right of judicial review of Board action was accorded to carriers than to employees. The Court noted that Congress, by Public Law 89–456, 80 Stat. 208, effective June 20, 1966, had legislated to correct these difficulties, but observed that the employee in *Walker* had not had the benefit of these new procedures. It therefore declined, "in his case," 385 U. S., at 199, to overrule *Moore*. Petitioner Andrews, however, would in the prosecution of his claim before the Adjustment Board have the benefit of these

improved procedures. We now hold that he must avail himself of them, and in so doing we necessarily overrule *Moore* v. *Illinois Central R. Co., supra.*

Affirmed.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

I

If this employee wanted reinstatement and back pay, there would be merit in remitting him to the remedies under the Railway Labor Act. But he does not want that relief. Rather, he desires to quit the railroad, to have no further jobs with it, and to be compensated in dollars for his wrongful discharge.

The cases on which the Court relies to overrule *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, are quite different. *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.*, 353 U. S. 30, involved claims of existing employees, not for damages for wrongful discharge, but for "additional compensation" and for "reinstatement," and involved a "minor" dispute, that is, a controversy "over the meaning of an existing collective bargaining agreement." *Id.*, at 32–33. *Machinists* v. *Central Airlines*, 372 U. S. 682, also involved reinstatement "without loss of seniority and with back pay." *Id.*, at 683. In *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650, the aggrieved employee wanted "severance pay" allegedly owed under the collective-bargaining agreement. *Id.*, at 650–651. In *Walker* v. *Southern R. Co.*, 385 U. S. 196, the dispute basically involved an issue of seniority, though the opinion does not disclose it.[1]

[1] The opinion of the Court of Appeals in the *Walker* case makes clear that the seniority dispute was based on the collective agreement. 354 F. 2d 950.

The complaint in this case alleges that following an automobile accident, in which the petitioner-employee was involved, the company refused to allow him to go to work on the ground he had not recovered sufficiently to perform his former duties. No issue involving the collective-bargaining agreement was tendered. Petitioner—rightly or wrongly—claimed this was a discharge and that under Georgia law, governing the place where he worked, he had been deprived of wages from the time he recovered from the accident, and that he was deprived "of the expectancy of future earnings . . . until the date of his scheduled retirement."

In other words, he asks for no relief under the collective agreement, he does not ask for reinstatement or severance pay, he does not ask for continued employment. He is finished with this railroad, and turns to other activities; he seeks no readmission to the collective group that works for the railroad. He leaves it completely and seeks damages for having been forced out.[2]

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[2] The Georgia law of "wrongful discharge" seems to amount to a set of common-law axioms of construction to fill in the ambiguities in employment contracts and employment relationships. If there is a contract, however, which expressly addresses the issue, the contract, and not the construction axioms, controls. For example, unless a contract provides otherwise, disobedience is a ground for discharge, *Georgia Coast & Piedmont R. Co.* v. *McFarland*, 132 Ga. 639, 64 S. E. 897, as is disrespectful language, *Wade* v. *Hefner*, 16 Ga. App. 106, 84 S. E. 598. If the employment contract, whether oral or written, provides that the worker may be fired only if his performance is unsatisfactory, he may not be discharged only for economic necessity, *Lummus Cotton Gin Co.* v. *Baugh*, 29 Ga. App. 498, 116 S. E. 51, although "mitigating factors" may generally be a defense. *Walker* v. *Jenkins*, 32 Ga. App. 238, 123 S. E. 161.

But where the language of the agreement is clear, that language controls and not the rules of construction. Thus if the parties provide that the employer may fire at will, no discharge can be wrongful. *Webb* v. *The Warren Co.*, 113 Ga. App. 850, 149 S. E. 2d 867.

The general presumption is that hiring is terminable at will,

To remit him to the National Railroad Adjustment Board is to remit him to an agency that has no power to act on this claim. We said as much in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239. That case involved a grievance that "concerned interpretation of an existing bargaining agreement." *Id.*, at 242. We therefore held that the employee first had to exhaust his remedies before the Adjustment Board. We distinguished the case from *Moore* as follows:

> "Our holding here is not inconsistent with our holding in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to

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unless some definite period of employment is provided or inferable from the relationship. Ga. Code Ann. § 66–101 (master and servant). The intent of the parties is the guide to determine if the courts may look to custom or the pay interval, if the contract is otherwise ambiguous. *Odum* v. *Bush*, 125 Ga. 184, 53 S. E. 1013. Thus, if the worker is paid monthly, he must be given 30 days' notice.

As to damages, once it is shown that the discharge was wrongful, the measure of damages is the difference between the rate of pay and what the dischargee might have been able to earn in other employment. Ga. Code Ann. § 4–216. The fact that the employer prevented the employee from performing the remainder of the service is not a bar to recovery on that portion of the term. *Irwin* v. *Young*, 91 Ga. App. 773, 87 S. E. 2d 322.

For Andrews to recover on a damages theory, it appears that it would be necessary for him to show first that he was not dischargeable at will. We do not know from the pleadings what proof Andrews will tender. So far as we can now tell the collective agreement is not in issue. His complaint does not state the source of the employer's duty; and respondents allege that the collective agreement creates no such duty. As to damages it is also impossible to say that any terms of the collective agreement will be relevant to this dispute.

be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. *A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide,* and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board." 339 U. S., at 244. (Emphasis added.)

The Adjustment Board has considerable expertise in construing and applying collective-bargaining agreements, as respects severance pay, seniority, disciplinary actions by management, and the various aspects of reinstatement. But the body of law governing the discharge of employees who do not want or seek reinstatement is not found in customs of the shop or in the collective agreement but in the law of the place where the employee works. The Adjustment Board is not competent to apply that law. In the first place the members of the four divisions of the Adjustment Board authorized by 45 U. S. C. § 153 First (b) presumably do not know the local law governing the employee-employer relationships in all of the States where railroads run. In the second place, the personnel of these divisions of the Adjustment Board may occasionally have lawyers on them but law-trained members are the exception, not the rule. In the third place, an employee seeking damages for reinstatement is normally entitled to a jury trial; and no division of the Adjustment Board ever pretends to serve in that role.

The Board, we now know, is made up of laymen; those laymen have no insight into the nuances of Georgia

law on the question of damages, and they obviously cannot even purport to give the remedy in damages which a "court suit" entails.

The regime of mediation and arbitration under collective-bargaining agreements, such as the one we upheld in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, and those we have cited under the Railway Labor Act, are important in stabilizing relations between unions and employers. See *U. S. Bulk Carriers* v. *Arguelles*, 400 U. S. 351, 355–356. But where the collective-bargaining agreement is not directly involved, and certainly where the individual employee, who tenders his grievance, wants to quit the railroad scene and go elsewhere and sever his communal relation with union and railroad, the case falls out of the ambit of authority given to the mediation or arbitration agencies.

The courthouse is the forum for that litigant and I would never close its door to him, unless the mandate of Congress were clear. Even then I do not see how the Seventh Amendment could be circumvented: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

Though the case is in the federal courts, this employee sues to enforce a common-law right recognized by the State of Georgia. The only place he can get a trial by jury is in a court. If he sues under a collective-bargaining agreement, he does not sue at common law but under a statutory federal regime. Yet that is not this case.

Everyone who joins a union does not give up his civil rights. If he wants to leave the commune and assert his common-law rights, I had supposed that no one could stop him. I think it important under our constitutional regime to leave as much initiative as possible to the individual. What the Court does today is ruthlessly

to regiment a worker and force him to sacrifice his constitutional rights in favor of a union. I would give him a choice to pursue such rights as he has under the collective agreement and stay with the union,[3] or to quit it and the railroad and free himself from a regime which he finds oppressive. I would construe the federal law as giving the employee that choice. The choice imposed by the Court today raises serious constitutional questions[4] on which we have not had the benefit of any argument.

This is a plain, ordinary, common-law suit not dependent on any term or provision of a collective-bargaining agreement. I cannot, therefore, join those who would close the courthouse door to him. Under the First Amendment, as applied to the States by the Fourteenth, he is petitioning the Government "for a redress of grievances" in the traditional manner of suitors at common law; and by the Seventh Amendment is entitled to a jury trial.

II

As noted, my basic disagreements with the majority concern the validity of the two assumptions implicit in its holding: (a) that the collective agreement will be sufficiently implicated in this dispute to warrant the application of federal substantive law, and (b) that Congress has vested the Board with jurisdiction to enter-

[3] The Board is currently disposing of petitions at the rate of about 1,500 annually. At that rate the Board will eliminate its present backlog of slightly more than 3,000 cases in two years. Thirty-Seventh Annual Report of the National Mediation Board 95 (Table 9) (1971).

[4] Constitutional issues not raised by the parties are at times passed upon by the Court. For a notorious example, see *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, and Butler, J.'s comments, *id.*, at 88–89. See also *Mapp* v. *Ohio*, 367 U. S. 643, 673–677 (Harlan, J., dissenting); *Redrup* v. *New York*, 386 U. S. 767, 771–772 (Harlan, J., dissenting).

tain nonreinstatement grievances such as Andrews' complaint. But, even taking these assumptions as correct for purposes of argument, I believe the Court has erred.

The majority does not hold that Congress has mandated that the statutory procedure be the exclusive route for adjusting Andrews' grievance. Indeed, that path was foreclosed by our decision in *Walker* v. *Southern R. Co.*, 385 U. S. 196, holding that prior to the 1966 amendments Congress had evinced no such purpose, and by the fact that nothing in the 1966 amendments themselves evidences an intention to render the statutory channel exclusive for nonreinstatement claims.[5] Rather, today's result is grounded in the authority of the federal courts to fashion the substantive law to be applied to collective agreements. *Machinists* v. *Central Airlines*, 372 U. S. 682, 695; see also *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448. Even under that assumption, I would not impose the exhaustion requirement upon this narrow and readily identifiable group of dischargees.

There is no equation of the substantive law to govern agreements under § 301 of the Labor Management Relations Act, into which exclusive arbitration clauses may voluntarily be inserted by the parties and the substantive law to govern railroad contracts, onto which the statutory grievance procedure is superimposed by law. One would not suppose that every doctrine developed under the Labor Management Relations Act, 61 Stat. 136, should be carried over into the apparatus created by the Railway Labor Act. A salutary doctrine under one measure may serve no worthwhile purpose under the other. Yet today the majority transplants

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[5] Nothing in the 1966 amendments, nor their related legislative history, even suggests or hints at a design to overrule *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630. See H. R. Rep. No. 1114, 89th Cong., 1st Sess. (1965); S. Rep. No. 1201, 89th Cong., 2d Sess. (1966).

the *Maddox* rule in the foreign soil of the railroad world without any discussion of the ends to be served. Even *Maddox* cautioned against that result, stating that any overruling of *Moore* should come only after "the various distinctive features of the administrative remedies provided by [the Railway Labor] Act can be appraised in context, *e. g.*, the make-up of the Adjustment Board, the scope of review from monetary awards, and the ability of the Board to give the same remedies as could be obtained by court suit." 379 U. S., at 657 n. 14.

It is said that the fact that Congress (rather than private parties as in *Maddox*) fashioned the instant adjustment procedure somehow reinforces a presumption of exclusivity. Yet it is difficult to perceive how that can be when it is also conceded, as mentioned earlier, that Congress itself has never designed its prescription to be the sole avenue of redress for this limited class of claimants. Rather, the significance of the statutory source of this procedure lies in its inflexibility and immunity from modification through collective bargaining. Unlike the *Maddox* rule, what is done today cannot be undone tomorrow through contract negotiation.[6] That difference would seem to warrant caution to ensure that more is to be gained than lost by closing the courthouse door.

One clear disadvantage counsels against today's holding. Given the nature of permanent dischargees' weak positions *vis-à-vis* their former unions, the personnel manning the adjustment mechanism, its haphazard decisional process, and the absence of judicial review of Board decisions, the risk is substantial that valid com-

[6] It was expressly observed by the majority in *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650, 657–658, that bargaining parties could avoid the force of that opinion simply by agreeing that arbitration was not the exclusive remedy.

plaints of permanent dischargees such as Andrews will be unfairly treated.

The machinery erected by the Railway Labor Act was not meant to be judicial in nature. Rather, it was designed as an arbitration process in which the union and the carrier occupy opposite sides of a bargaining table. As a substitute for the economic battleground, the process envisions decisionmaking on the basis of strength and accountability to the interests represented. Unions will often press one grievance at the expense of another. If Andrews were a continuing union member perhaps he would receive equal representation. But because the union will not have to answer to him if his claim is lost the union may yield its merit in the logrolling process carried on with management. I now have doubt that the reasoning of *Maddox* was sound insofar as we opined that a union agent will have sufficient interest in faithfully prosecuting the complaint of a former member who "has lost his job and is most likely outside the union door looking in instead of on hand to push for his claim." 379 U. S., at 653 (majority opinion), and 668 (Black, J., dissenting). Indeed, only this Term in *Chemical Workers* v. *Pittsburgh Glass*, 404 U. S. 157, we refused to permit a union to represent nonvoting pensioners, holding that under the National Labor Relations Act, 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.*, the company was not required to bargain with respect to pension plans affecting inactive retirees. We reasoned that "the risk cannot be overlooked that union representatives on occasion might see fit to bargain for improved wages or other conditions favoring active employees at the expense of retirees' benefits." [7] *Id.*, at 173.

[7] One commentator on the Act has warned that representation by a union may be a critical factor in obtaining a favorable award: "[A]n individual's efforts will presumably be less effective than that

Beyond the inherent risk of compromise of a dischargee's claim there lie still further obstacles to fair treatment. First, the internal procedures used by the Board are far afield from those normally associated with impartial adjudication. The Board is exempt from the Administrative Procedure Act, § 2 (a)(1), 5 U. S. C. § 551 (1). One account of its *ad hoc* procedures leaves little doubt that before that forum Andrews will have no means of proving his allegations:

> "As the Board has operated in practice, the procedures followed in holding hearings have been quite informal and have differed from the trial-type hearings conducted by other agencies established and maintained by the Federal Government. Disputes are referred to the Adjustment Board by the filing of written submissions. Each submission contains a statement of claim, accompanied by a statement of facts. If the parties can agree, a joint statement of facts is filed; if they cannot agree, separate submissions are filed, stating the facts separately. All submissions are in writing. Parties may be heard in person, by counsel, or by other representatives as they elect. . . . It would be most extraordinary for live testimony to be given by witnesses. There is no requirement that a factual submission or other

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of a union, particularly since the grievance will ultimately be resolved by a board composed in part of representatives of affected unions." Risher, The Railway Labor Act, 12 B. C. Ind. & Com. L. Rev. 51, 72 (1970). The plight of the unionless grievant is more alarming when viewed in light of the unsatisfactory record under the Act: *"The Railway Labor Act is special privilege legislation,* the product of the once great political power of the railroad unions. It has been administered as such. This accounts for the dismal administrative records of the National Mediation Board and the National Railroad Adjustment Board in . . . protection of individual rights, and grievance adjustments." Northrup, Foreword to Risher, The Railway Labor Act, *supra,* at 52.

written statement be sworn. There is no cross-examination of witnesses and no record or transcript of the proceedings. There is no provision for issuance of subpenas or compulsory attendance of witnesses." Hearing on H. R. 706 [1966 Railway Labor Act amendments] before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 89th Cong., 2d Sess., 49 (1966).

All of this might be made tolerable if at some point in his journey Andrews could look forward to a judge's inquiry into the affair. But the fact is that whatever order by whatever process the Board may enter will be virtually immune from any judicial review because an award, either of the Adjustment Board or of a special board, is reviewable only for fraud or for lack of jurisdiction. 45 U. S. C. § 153 (p) (proviso).

On the other side of the balance, it could not be claimed that permitting a judicial remedy (in addition to an administrative one) would risk economic warfare, especially in light of the estranged relationship of permanent dischargees to their former unions. Nor could it be claimed that a judicial remedy would risk nonuniformity in interpretation of collective agreements inasmuch as courts as well as the Board would be obliged to apply a single body of federal common law. See *Maddox*, *supra*, at 658 n. 15.

In summary, the danger of unfair treatment of the clearly identifiable class of dischargees represented by Andrews is so great, without any compensating advantages, that I would not confine these claimants to the administrative remedy.